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Supreme Court of the United States.

OCTOBER TERM, 1901.

THE CITY OF NEW YORK and BIRD S. COLER, as Comptroller thereof,

Appellants,

against

SAMUEL PINE and FREDERICK MULLER,

Appellees.

Statement and Points by the Corporation Counsel of The City of New York in behalf of the Appellant.

This case comes before the Supreme Court of the United States by virtue of its writ of certiorari directed to the United States Circuit Court of Appeals for the Second Circuit. The decision of the said Circuit Court was rendered on October 30, 1901, but this decision was by a divided court. Judge Thomas wrote the prevailing opinion, Judge Wallace concurring, while Judge Wheeler wrote a dissenting opinion which sustains the position taken by the appellant, the City of New York.

The action is in equity. The appellees in 1896 filed their bill in the United States Circuit Court, for the Southern District of New York, to restrain the City of New York from diverting a part of the water of the Byram river from its natural channel into the reservoirs and water supply of the City. The diversion or intended diversion takes place in the State of New York where the stream has its origin.

As the matter now stands the City is under a perpetual injunction in the broadest terms absolutely prohibiting it from using any part of the West Branch of the Byram river for its water supply, although all of said West Branch above the point of diversion is entirely within the State of New York.

The diversion of this stream has taken place under the authority of certain statutes of the State of New York purporting to give authority to the City of New York to do the acts complained of.

The facts are simple and undisputed. The only controversy on the hearing in the Circuit Court was whether there was any real damage to the plaintiffs from the diversion of the water. The complainants themselves admitted that they had suffered no substantial damage, and at most the evidence of damage was very unsatisfactory and of a comparatively insignificant amount. We do not of course expect this Court to examine the question of fact, but we shall assume the most that the plaintiffs can claim, to wit, that they did suffer some small amount of damage by the diversion of the water.

The complainants are citizens of and residents in the State of Connecticut and owners in fee, respectively, of two farms situated on the Byram river.

The defendant is a municipal corporation of the State of New York and as such a citizen of that State;

so that the Circuit Court acquired jurisdiction, if at all, by virtue of the fact that the parties were residents of different States.

The Byram river is a non-navigable stream of fresh water flowing into Long Island Sound.

Tracing its course up stream from the Sound, for a short distance it forms the boundary between the States of New York and Connecticut, then deflects to the east, and for some five or six miles is entirely within the State of Connecticut, during which time it flows through or along the side of the two farms belonging to the complainants.

Mr. Muller's farm is the one further up stream. On the northern boundary of that farm the river divides into two branches, the East Branch being entirely within the State of Connecticut.

Following the West Branch up stream a short distance, we come to the boundary line between the States of New York and Connecticut, beyond which line the West Branch with all its ponds and tributaries is entirely within the State of New York.

The City of New York, acting under authority of the Legislature of the State of New York, at the time of the institution of this suit was building a dam across the said West Branch entirely within the State of New York and about 700 feet from the Connecticut line, the effect of which dam, when completed, would be to divert a part and at certain times perhaps all of the water of the said West Branch of the Byram river, having its origin above the said dam, from its natural channel into the pipes and reservoirs and water supply of the City of New York.

Said action would, of course, to some extent, lessen the natural flow of the stream past the complainants'

property, but the East Branch would be entirely unaffected and also the part of the West Branch originating below the City's dam, so that the complainants could not be deprived of more than about one-quarter, as is shown by the testimony (fol. 54), of the natural flow of the Byram river.

In the bill of complaint it is alleged that the complainants and each of them would be damaged in the sum of $2,400 and more by the alleged illegal diversion of the water and hence they pray for an injunction restraining the defendant, its officers and agents, from building the said dam and from maintaining or continuing to maintain the same and from diverting the water.

The defendant alleges that the intended diversion would cause little if any injury and damage to the complainants, and alleges, in effect, that it has taken proceedings to acquire title to large quantities of land in the vicinity for constructing dams, aqueducts, reservoirs and other structures necessary for its supply of water, and has expended upwards of $30,000,000 in providing for said water supply.

It avers that the dam will be of great and permanent benefit to the City of New York and its residents and to all persons dwelling therein, and *avers that it is and always has been amply able and willing to pay any damages that the complainants may suffer from being deprived of the water that naturally comes from the said West Branch of the Byram river.*

(1) As to the Damage to the Complainants. -

Judge Shipman, before whom the case was tried at Circuit, writes as follows in his opinion:

> "Testimony was offered by each party with respect to the value of the two properties and the amount of pecuniary damage in consequence

of the diversion of the water. That there will be an actual, continuing, pecuniary damage more than nominal in amount is manifest, but whether more or less than two thousand dollars or what will be the exact amount I did not undertake to find because it was unnecessary.

"In the absence of a plea to the jurisdiction the allegation in bills in equity that the amount of damage in each case exceeded two thousand dollars, 'though denied by the answer even if not 'sustained by the proof, was sufficient to give 'the Circuit Court jurisdiction' (citing cases).

"A number of unknown factors enter into an estimate of damage from a diversion of water, such as the probabilities of future years of excessive drought; the prospective uses to which the properties may be applied, and the prospective demands for other than agricultural uses which cause the estimate of actual pecuniary damage to be one of inaccuracy."

As intimated, we do not expect this Court to review the question whether there was actual, substantial damage to the complainants, but shall assume the most that they can claim under Judge Shipman's decision, to wit: That they did suffer some small amount of damage by the diversion of the water.

It is, however, open to us to urge that this damage is very small and almost insignificant compared with the loss and damage that would result to the defendants if the injunction in this case were to remain in force.

We will, therefore, very briefly refer to the testimony:

Mr. Pine's farm consists of 102 acres. He values it at $50,000, although his father bought it in 1870 for about

$13,000. Its assessed value on the assessment-books of the town was $8,000, and the valuation put upon it by the experts of the defendant was $9,000 or $10,000, and the value put upon it by the complainant's experts was $15,000.

Mr. Pine works a heavy deposit of feldspar on the property, but the mill for grinding it is *run by steam*, and the water of the Byram river is used merely to supply water for the boiler. Mr. Pine describes the use to which he puts the land as follows (fol. 392):

> "We generally raise about two to three acres of potatoes, about seven or eight acres of corn; that is our average. * * * At present we have got four cows, one pair of oxen and, I think, seven horses. * * * Since we opened the quarry, about five years ago, we have cut down our cattle stock."

He doesn't use the water of the stream even for his cattle in winter, and only uses it to supply water for the boiler, and he has always had water enough for that purpose. *He only owns lands on one side of the river.*

Mr. Muller's farm consists of about 45 acres. He values it at $8,000, and its assessed value upon the assessment books of the town is $2,500, and the experts called for the defendant valued it at from $5,000 to $6,000. The water is used only for ordinary farming purpose. Mr. Muller testified that he used the stream for ordinary farm purposes, and that his cattle went to the river to drink, and that there had always been enough water in the river for that purpose.

It is thus to be observed that neither of the complainants in their own testimony show or claim any damage from the diversion of the water.

All of the other evidence on the amount of damage is as indicated below.

Mr. Birdsall, the City's Chief Engineer as to its water supply, was called as a witness for the complainants and testified that the damage to Mr. Pine's property would be $1,862.50 and to Muller's $572.50 (fols. 144, 145).

This evidence was duly objected to and can hardly be considered evidence at all, nor, if admissible, is it entitled to much weight. It was not taken directly in the suit, but in some affidavit, and the surrounding circumstances are not shown.

It assumes that all the water in the West Branch was diverted, which is not the fact, and Mr. Birdsall is not an expert on such questions. His testimony is rather an estimate of what it would be reasonable and proper in his opinion for the City to pay in order to get out of an embarrassing situation.

Mr. Knapp, a witness for the complainants, testified that the injury to Mr. Pine's property amounted to "more than $2,000" (fol. 196).

Mr. Jenckes, a Civil Engineer, testified on direct examination to the effect that under certain hypotheses a diversion of the water would diminish the value of the Pine property by $6,000.

This was on the theory that there was a water power on Mr. Pine's land which was injured by the diversion of the water and that, in order to make this injury good, by the substitution of steam power, it would cost $6,000.

This theory was overthrown, however, as we think, it appearing that Pine owned on one side of the river only and, hence, could not construct a dam so as to have a water power, and it appearing as a matter of fact he had made no attempt to make use of any water power on his land, but was running a mill to grind feldspar *by steam power.*

As to Muller, there was no testimony whatever to show any damage to his property, except that of Birdsall, mentioned above (*i. e.*, $572.50).

The witnesses for the defendant testified that the diversion of the water did not diminish the value of the farms at all.

To sum up the situation as to Pine, the testimony, such as it was—and none of the testimony is entitled to much weight—places the estimated damage at from nothing to $6,000.

There is no finding by the Circuit Court Judge as to the actual amount of damage, but he undoubtedly considered it small, as is evident from what we have quoted above from his opinion, and if we assume that in the case of Mr. Pine it was $2,000, we think that is entirely fair to the complainant.

As to Muller, the highest testimony, if even it could be deemed to be testimony, was $572.50, which, in the present relations, may fairly be said to be trifling.

(2) As to the Damage to the Defendant if the Injunction is Sustained.

The decree of injunction appealed from is as follows:

> "This cause came on to be heard at a Term of the United States Circuit Court for the Southern District of New York, and was argued by counsel and thereupon, upon consideration thereof, it is
>
> "Ordered, adjudged and decreed as follows, to wit:
>
> "That the complainants in this suit and each of them are entitled to the injunction order of this

Court restraining the defendant, its successors and assigns, their and its officers, agents and employees, each, all and any of them, from diverting the water or any part of the water of the West Branch of the Byram river or any part of the water of the Byram river, or in preventing in any way said water or any part thereof, at any time from flowing through its natural channel, before, at and below the junction of the two branches of said river; and it is further

"Ordered, adjudged and decreed that the defendant, its successors and assigns, their and its officers, agents and employees, each, any and all of them, be and they and each of them are hereby perpetually enjoined from diverting the water or any part of the West Branch of the Byram river, or any part of the water of the Byram river, or in preventing in any way said water or any part thereof at any time from flowing through its natural channel, before, at and below the junction of the two branches of said river; and it is further

"Ordered, adjudged and decreed that a writ of injunction do issue on the first day of November, in the year nineteen hundred, against the defendant, its successors and assigns, their and its officers, agents and employees, and each, any and all of them, commanding them to comply with all and singular the premises, matters and things so enjoined upon them; and it is further

"Ordered, adjudged and decreed that the complainants, and each of them, recover their costs in the premises, to be taxed by the Clerk of this Court.

"Dated July 24, 1900.

"N. SHIPMAN,
"Circuit Judge."

The injunction is thus in the broadest terms, and, if sustained, the City will be absolutely prohibited from using any part of the West Branch of the Byram river for its water supply, although all of it above the dam is entirely within the State of New York, where the said West Branch has its origin.

Elaborate statutory provisions have been enacted by the State of New York giving the City of New York the power to exercise the right of eminent domain in order to secure the right to this water for the City's water supply, and providing amply for the payment of damages.

The principal statute is chapter 445 of the Laws of 1877.

There are also other statutes intended to accomplish the same object, of which doubtless this Court would take judicial notice if it were necessary to refer to them.

The statute of 1877 with its amendments has been printed as an appendix to this brief for convenience of reference. It appears that the City has acquired by purchase and through condemnation proceedings under the said statute all land and property rights in the State of New York affected by the diversion and the lands on which the ponds and lakes are.

> "It has paid all the damages for the diversion of the stream above the Connecticut State line to this water right" (fol. 55).

The City has settled by private agreement with all the mill-owners along the stream and with owners of various property rights below the dam, including those in Connecticut, paying $379,000 therefor (fols. 71–73).

That is, it has settled with all the people seriously injured.

The City has filed maps under the condemnation statute of 1877 for more or less land along the line of Byram river and its branches, which proceedings, it would seem, were not all concluded at the time of trial of this action.

The cost of the dam alone without any of its appurtenances was about $45,000 (fol. 141), and the cost of the dam and work connected therewith "has already "cost the City of New York upward of $1,000,000, and "will cost the City much more" (fol. 143). The ownership of the dam and pond was acquired by the City and paid for in 1884 (fols. 164–167). The direct cost to the City of New York of what has already been done to secure additional water supply by diverting a part of the Byram river is thus—

Cost of dam and work connected therewith to get the water to New York, upwards of	$1,000,000 00
Damages to mill owners, etc	379,000 00
	$1,379,000 00

Even this we understand does not include the amount to be paid for all of the land in process of condemnation, nor the effect on the City's general water supply system, which has cost upwards of $35,000,000.

It further appears (see fols. 542–545) that portions of the Twenty-third and Twenty-fourth Wards of the City of New York are supplied with water from the Bronx, Byram and Rye ponds; and that about 125,000 people are dependent upon that supply for their water. About seven-twentieths of the supply for those people is furnished by the waters of the Byram river, and they are similarly dependent for water in case of fire.

The great damage and injury that will result to the defendant if this injunction is sustained is thus evident.

It will mean the direct loss of some $1,500,000; a substantial diminution of the City's water supply, already inadequate; an interference with the general water supply system of the City upon which it has expended upwards of $30,000,000.

Last but not least it involves practically an adjudication that every State in the Union is restricted as to the water supply of its own municipalities to streams which do not anywhere below the point of diversion flow into another State.

If an injunction will lie in a case like this, it will lie in any case where a diversion has been made in one State from a stream flowing into another State.

(3) As to Efforts to Settle.

Considerable space is taken up in the testimony (fol. 68–118) by accounts of settlements made with other individuals and of conferences held between City officers and representatives of the complainants. The possible damages were estimated all the way from 10 cents (fol. 87) to $4 (fol. 81, 82) per running foot of the frontage on the stream, and it may be said that it appears from the evidence that the City had a standing offer to settle at the rate of 50 cents per running foot (fol. 113) and even $1.50 per running foot was advised by one of the City's representatives (fol. 113).

It cannot therefore be said that the City has refused to negotiate or has acted arbitrarily.

What the City asks is that it shall not be coerced if it cannot agree with the complainants. The question of damages should be settled by some competent tribunal; and before any such tribunal it is willing to go, and indeed it can be compelled to go before the Federal Courts; and with this it is satisfied.

(4) SUMMARY.

The above contains, we believe, a sufficient statement of all the facts that it will be necessary to consider in order to determine the legal questions involved.

It is to be remembered that all we are contending for in this suit is that the special remedy by injunction shall not be enforced.

We are not maintaining that the complainants have no action for damages. That is an entirely different proposition. We concede that the complainants are entitled to recover in an action in the courts of the State of New York, or in the Circuit Court of the United States, whatever damages they can show they have sustained.

We contend that the complainants have not an absolute right to an injunction, and that they cannot refuse to avail themselves of the other remedies which the law allows, and insist upon an injunction involving enormous pecuniary loss to the defendant and great public injury and inconvenience—the only loss or injury to themselves being small and easily compensated for in damages, which damages the defendants are willing, ready and able to pay.

It was written by the Supreme Court of Pennsylvania in *Robb* vs. *Carnegie*, 145 *Penn. St.*, 324, as follows:

> "*An injunction is not of right but of grace, and*
> "*will never be issued by a Court of Equity when it*
> "*will inflict a greater injury than it will prevent.*
> "*In such a case the injured party will be left to his*
> "*redress at law.*" (See under our Fourth Point below.)

The complainants, however, insist that they are entitled as of right to a perpetual injunction restraining the said diversion, and will not accept compensation for damages they may have suffered nor submit the question to any tribunal. Being citizens of Connecticut they claim that the laws of New York State have no application, and that the contest is really under common law rules between an upper and lower riparian proprietor, who are both private citizens.

The contest, however, is vastly more important. It relates to public matters of the gravest importance.

If this injunction is to be sustained the following proposition must be held to be true: There is a large class of property or property rights in a State which is not subject to the exercise of the right of eminent domain by that State—a class of property which there is no means of using for public purposes because there is an easement or servitude attached to the same, held or owned by the citizens of another State, which the first State is powerless to do away with, and which renders the said property or property rights within its own territory unavailable for itself or its own citizens. In other words, the State in which the said property and property rights are situated does not control the same, but another State or the citizens of that other State.

It is respectfully submitted that this result must logically follow from the decision of the Court below. A doctrine which arrives at this result we submit with much confidence should be thoroughly examined by the Supreme Court of the United States.

If the prevailing opinion in the Court below is correct, then there is no means known to the law whereby a State can make use for the most necessary public purpose of the water of a stream arising in its own territory, if that stream eventually runs into another State.

Any abutting land-owner in the other State, no matter how little the diversion of the water may injure him, or perhaps if it does not injure him at all, can immediately enjoin the diversion.

The first State is absolutely powerless, no matter how liberally it may be willing to compensate the citizen of another State, no matter how complete a scheme it may provide through its courts for the payment of damages.

The consequences of such a doctrine are evident. The instances, taking the whole of the United States, where a stream of water arises in one State and eventually flows into another State are legion. The result of the doctrine laid down by the Court below would be that the lower riparian owners in a foreign State may absolutely prohibit the use of water for public purposes of the upper riparian proprietors in another State.

A State in which water rises and flows for scores of miles would have no control of the water, could not by any legislative act change the rules of the common law within its own borders, and could not pass laws which would allow diversion of any of this water even for public purposes. In other words, cities, towns and villages would be unable to use all the waters of their own State for purposes of drinking and cleanliness, extinguishment of conflagrations and other municipal purposes.

The City of New York in building this dam and diverting the water is acting under authority of the State of New York, and has the entire power of that State in the premises.

To say that the City of New York cannot build this dam and divert the water is equivalent to saying that the State of New York cannot do it.

In the present case the State of New York has done all that it is possible for a State to do in the way of authorizing the acquisition of the right claimed in this case, and has provided a scheme by which compensation must be paid, and the power of the courts, Federal as well as State, is sufficient to enforce payment of whatever damages the complainants may have suffered.

FIRST POINT.

We state under this head what we consider to be the common law which prevails in the States of New York and Connecticut, relating to the diversion of water from a non-navigable stream, where there is no question as to governmental or public right, but only private individuals are concerned.

The law is thus laid down by Chancellor Kent in volume 3 of his Commentaries, at page 439:

> "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Although he may use the water while it runs over his land, as an incident to the land, he cannot unreasonably detain it, or give it another

direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant, or uninterrupted enjoyment of twenty years, which is evidence of it."

This statement of the law is quoted with approval and stated to be undoubted, and to be the rule in those States in the Union which have simply adopted the common law, in

United States vs. *Rio Grande Co.*, 174 U. S., 690 (1899).
Atchison vs. *Peterson*, 20 Wall, 507.

An illegal diversion of water is technically a private nuisance, the remedy at common law being damages to be recovered in an action, in trespass on the case generally, and Courts of Chancery also have concurrent jurisdiction.

Gardner vs. *Newburgh*, 2 Johns. Ch., 162.
Merritt vs. *Brinkerhoff*, 17 Johns, 306.
Crooker vs. *Bragg*, 10 Wend., 260.
Wadsworth vs. *Tillotson*, 15 Conn., 366.

There are innumerable cases on the subject, but it is unnecessary to refer to them at length.

There is no substantial difference between the learned counsel for the complainants and ourselves on this phase of the subject.

The defendants are only concerned with one of these remedies, to wit, the remedy in equity. They invite the complainants to make use of their remedy in damages at common law.

The principal cases have been cited and summarized in the late and important case of

> ***Strobel* vs. *Kerr Salt Co.*, 164 N. Y., 303 (1900). (Motion for reargument denied, 165 N. Y., 15.)**

The following is from the opinion in the *Strobel* case:

> **"A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alterations in quality or unreasonable diminution in quantity."**
>
> **"While he does not own the running water, he has the right to a reasonable use of it as it passes his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of others to have the stream substantially preserved in its natural size, flow and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. The use by each must, therefore, be consistent with the rights of the others and the maxim of *sic utere tuo* observed by all. The rule of the ancient common law is still in force; *aqua currit et debet currere, ut currere solebat.***
>
> **"Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation, when not out of proportion to the size of the stream, and some other familiar uses, although, in fact, a diversion of the water, involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use in order to effect the highest average benefit to all**

the riparian owners. As the enjoyment of each must be according to his opportunity, and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use. Surrounding circumstances, such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business, and *the indispensable public necessity of cities and villages for drainage* are also taken into consideration, so that a use which under certain circumstances is held reasonable, under different circumstances would be held unreasonable. It is also material, sometimes, to ascertain which party first erected his works and began to appropriate the water. * * *

"The question of reasonable use is generally a question of fact, but whether the undisputed facts and the necessary inferences therefrom establish an unreasonable use is a question of law."

* * * * * *

"*It does not follow from these views that if upon another trial the facts are unchanged the defendant and the other salt manufacturers will be compelled to make such terms as they can, for a court of equity with its plastic powers can require as a condition of withholding a permanent injunction the construction of a reservoir on the upper sources of the stream to accumulate water when it is plentiful for use in times of scarcity and thus neutralize the diminution caused by the manufacture of salt. That court may also require, on the like condition, greater care in preventing the escape of salt water and salt substances into the stream, as the defendant attempted to do during the trial, and thus prevent or minimize the pollution.*"

It is thus evident that there are some limitations upon the issuance of injunctions in cases like the present, even in the New York Courts, which seem to grant injunctions more readily than the Courts of some other States, in cases relating to the diversion of water.

It should be observed that the conclusions of the Court in the *Strobel* case are not in harmony with the decisions of the Pennsylvania, Indiana, New Jersey and Connecticut Courts and perhaps others, which are referred to and discussed below.

SECOND POINT.

If this case were to be considered as between private individuals merely, the complainants should be left to their remedy at law, and the bill should be dismissed for want of equity, and under section 723 of the Revised Statutes.

The early practice was that a bill in chancery would not be sustained to try and settle the legal right to a water course or to enjoin the use thereof, until after the legal right had been first settled in an action at law.

Prentiss vs. *Larned*, 11 Vt., 135 (1835).
Marble and Slate Co. vs. *Adams*, 46 Vt., 496 (1874).

The distinction between law and equity in such matters has been carefully preserved by the United States statutes relating to the Federal Courts.

In the United States Revised Statutes, section 723, it is provided as follows:

> "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

No doubt this section is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. The statute, however, shows a clear intent on the part of Congress that the remedies of equity should not be allowed to supersede the common law. One of the objects of this statute was to insure the preservation of the right to a jury trial.

> *Grether* vs. *Wright*, 75 Fed. Rep., 742.
> *In re Foley*, 76 Fed. Rep., 390.

It is to be observed that some of the State Court decisions, particularly those of New York, are not applicable as to the remedy by injunction in the Federal Courts because of the abolition of the distinctions between law and equity in pleading and practice.

The Federal statute, and the numerous decisions which might be cited thereunder, are important here, for the reason that the evidence as to actual damage is exceedingly vague and unsatisfactory, and if this injunction stands, the defendants have been deprived of a trial by jury on the question whether or not the complainants have in reality suffered any damages.

(1) A Fundamental Error in the Courts Below.

The learned Circuit Court Judge did not find any particular amount of damage, writing as follows:

> "That there will be an actual continuing pecuniary damage more than nominal in amount is manifest, but whether more or less than $2,000,

or what will be the exact amount, I did not undertake to find, because it was unnecessary."

He sustains the jurisdiction of the Court merely on the ground that an allegation in a bill in equity that the damages exceeds in amount $2,000 is sufficient to give the Court jurisdiction whether denied or not, and whether sustained by the evidence or not.

That is, the Court has held that an actual continuous damage more than nominal in amount, always justifies and even requires an injunction.

This we submit is not the law. It leaves out of account entirely many important considerations. Diversion of water is not always and under all conditions illegal even if it does result in damage to a lower proprietor.

There is no doubt that there must be some proof of damage to sustain the bill (*Gould on Waters*, sec. 206). But this alone is not enough. As was said in the *Strobel* case, from which we have quoted above, consumption by watering cattle, irrigation when not out of proportion to the size of the stream, although in fact a diversion involving some loss, are not regarded as an unlawful diversion but are allowed as a necessary incident to the use in order to effect the highest average benefit to all the riparian owners " as the enjoyment of each must be according to " his opportunity, and the upper owner has the first " chance the lower owner must submit to such loss as is " caused by reasonable use." Secondary circumstances such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business and the "*indispensable public necessities of* "*cities and villages for drainage*" and water supply should be taken into account; so that a use which under

certain circumstances is held reasonable, under different circumstances would be held unreasonable.

All those considerations are overlooked in the decisions below.

The City has acquired all the rights of the former property owners in this stream above the dam. Can it be that while they could, if necessary, use up all the water of the stream in watering their cattle, the City, their successor, could not do the same thing to furnish water to human beings?

An important error of the Court is in holding that any substantial permanent injury, even if there is no serious pecuniary damage, requires the issuance of an injunction without considering the reasonableness or unreasonableness of the amount of diversion, or that the injury to the complainants is trivial while the loss and damage to the defendant is enormous, or that there is an "indispensable public necessity" for the use of the water, or any other circumstances of great influence in a court of equity.

The City, having acquired the rights of all owners of rights to the water in the State of New York, has become itself, in effect, an owner, and entitled to such uses of the water as its predecessors had. It may well be that all of these predecessors together would have been entitled to divert all that the City diverts. A riparian proprietor has a right to the ordinary use of water flowing past his lands, including the use of the same for domestic purposes, such as drinking, washing, cooking, or for his stock. The City by succeeding to the rights of riparian owners has thus become entitled to a certain reasonable use of the water, even extending to the consuming of a reasonable quantity thereof, and it is therefore incumbent upon the complainants to show that such use of

the water is unreasonable and also results in damage to them. Questions of this sort are peculiarly within the province of a jury—certainly in a case like the present one, where the evidence is of an exceedingly vague and shadowy character, upon which a jury might well find that no damage has been suffered by the complainants.

The following is from section 206 of *Gould on Waters*.

> "In view of the varying rights of different riparian owners on the same stream, injunctions should not be granted to regulate such rights except in clear cases of intentional violation."

A good case illustrating this principle is *Earl of Sandwich* vs. *The Great Northern R. Co., L. R.*, 10 Ch. Div., 707 (1878). This is the case of a railroad company which took water from a stream for supplying its engines and for the general purposes of the station.

On a bill filed by a mill-owner lower down the stream, it appeared that the abstraction of water did no damage in wet weather and never shortened the working of the mill for more than a few minutes a day. It was held that the company, as riparian owners, were entitled to take a reasonable quantity of water for their purposes, and that the quantity taken was reasonable.

The following cases may be cited on the proposition that whether a particular use of water is reasonable or not is a question of fact for a jury:

Prentice vs. *Geiger*, 74 N. Y., 341.
Colrick vs. *Swinburne*, 105 N. Y., 503.
Strobel vs. *Kerr Salt Co.*, 164 N. Y., 303.
Bullard vs. *Saratoga Victory Mfg. Co.*, 77 N. Y., 525.
Wadsworth vs. *Tillotson*, 15 Conn., 366.

(2) THIS COURT HAD A VERY SIMILAR CASE TO DEAL WITH IN THE YEAR 1862, AND REFUSED TO ALLOW AN INJUNCTION. WE CALL PARTICULAR ATTENTION TO THIS DECISION, TO WIT:

Parker vs. *Winnipiseogee Co.*, 2 Black, 545.

This was a suit in equity to enjoin an alleged nuisance, consisting in interference with the flow of waters from a lake. The defendant corporation was attempting to secure more abundant and regular supply of water for the mills at Lowell and Lawrence, and this was to be accomplished by making the lake a vast reservoir of water, to be accumulated and maintained in wet weather, and to be drawn off and passed down the stream as it might be needed in dry weather. The defendant had bought up all the water rights relating to the lake, and all those upon the river which formed its outlet, except the plaintiff's. The company had offered him the same price that was paid to others. He refused it, seeking to extort an unreasonable and unconscionable sum. The company had spent large sums of money in improvements without any objection from the plaintiff.

The following is from the opinion:

> "We have failed to find those clear facts of right upon one side and wrong upon the other, which are necessary to quicken into activity the powers of a court of equity. We forbear to pursue this inquiry because the case presents another ground free from doubt upon which we prefer to rest our decision.
>
> "It was urged at hearing, as an insuperable objection to the relief prayed for, that the appellant has not established his right by an action at law. The objection was not taken by demurrer or in the answer. In the courts of the

United States, it is regarded as jurisdictional and may be enforced by the Court *sua sponte*, though not raised by the pleadings nor suggested by the counsel. 2 Cr., 419; 5 Pet., 496; 2 How., 383.

"The 16th section of the Judicial Act of 1789 provides 'that suits in equity shall not be sus-'tained in either of the courts of the United States 'in any case where plain, adequate and complete 'remedy can be had at law.' This is merely declaratory of the pre-existing rule, and does not apply where the remedy at law is not 'plain, 'adequate and complete'; or, in other words, where it is not 'as practical and as efficient to 'the ends of justice and to its prompt administra-'tion as the remedy in equity.' 3 Pet., 205. But where the remedy at law is of this character, the party seeking redress must pursue it. In such case, the adverse party has a constitutional right to a trial by jury. 19 How., 278. The concurrent jurisdiction of courts of equity in cases of private nuisance, dates back to an early period in the growth of the English equity system. * * * It has been greatly enlarged since the time of Lord Thurlow. * * * It is now too firmly established to be shaken, but is not without limitation. It is governed by the same principles which animate and control its action in other cases where its aid may be invoked against a wrongdoer. * * * A diminution of the value of the premises without irreparable injury is no ground for interference. * * * *Where an injunction is granted without a trial at law it is usually upon the principle of preserving the property until a trial at law can be had.* A strong *prima facie* case of right must be shown and there must have been no improper delay. The Court

will consider all the circumstances and exercise a careful discretion. * * * Until the rights of the parties are settled at law, only a temporary injunction is issued to prevent irreparable injury. * * * This jurisdiction is applied only where the right is clearly established—where no adequate compensation can be made in damages and where delay itself would be wrong. * * * The case must be one of strong and imperious necessity or the right must have been previously established at law. * * * *If the evidence be conflicting and the injury doubtful, this extraordinary remedy will be withheld. * * * After the right has been established at law a Court of Chancery will not, as of course, interpose by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case.* * * * He (the complainant) does not allege either danger of irreparable injury, or of protracted litigation, or of a multiplicity of suits as the ground upon which he seeks relief in equity. There is no warrant for such averment. If he has been injured his injury can be ascertained and fully repaired by damages in an action of law. As a jury is the tribunal provided by law to determine the facts and to fix the amount, they can best perform this duty. The fact that other proprietors have been paid bears upon this point. 8 E. L. & E., 222–223. *The appellant can have no standing in a court of equity until he has laid this foundation for relief. This objection is fatal to the case. We decide nothing else.*

There are cases in which a court of equity will take jurisdiction and give a complete remedy without the previous intervention of a court of law. * * * But this case does not belong to that class."

Hence the decree of the Circuit Court dismissing the bill was affirmed.

Following the *Parker* case is

Consolidated Canal Co. vs. *Mesa Canal Co.*, 177 U. S., 296 (1900).

We refer to this case again under the following point.

(3) THE PROCEEDING BY INJUNCTION IS *in rem.*, AND MUST BE IN THE JURISDICTION WHERE THE INJURY IS CAUSED.

A party doing an injury in one State to a water-power running into another State may be proceeded against in a civil suit in either State in which he may be served in process, though proceedings *in rem.* by way of injunction or indictment to compel abatement can only be brought in the jurisdiction in which the nuisance exists.

6 Crim. Law Mag., 169.
Stillman vs. *Mfg. Co.*, 3 Woods & M., 538.
Foot vs. *Edwards*, 2 Blatch., 310.
Miss. & Mo. R. R. vs. *Ward*, 2 Black, 485.
Wooster vs. *Manco*, 31 Me., 246.
In re Eldred, 46 Wis., 530.
Thayer vs. *Brooks*, 17 Ohio, 489.
Armendiaz vs. *Stillman*, 54 Tex., 623.

The law of New York on this point is as follows:

An action will not lie for an injury done by the diversion of a watercourse where the premises injured are in another State. Such actions as they relate to injuries to realty are *local* actions.

Watts Administrators vs. *Kinney*, 23 Wend. 484.
S. c. *on Writ of Error*, 6 Hill, 82.
De Courcy vs. *Stewart*, 20 Hun, 561.
American Union Tel. Co. vs. *Middleton*, 80 N. Y., 408.

THIRD POINT.

Still treating this case as one between private individuals or corporations merely, it is a case for the application of the principle that a court of equity will not issue an injunction when it will inflict a greater injury than it will prevent; nor to restrain an act, the injurious consequences of which are merely trifling; but will leave the injured party to his redress in an action at law.

A recent case in this court where this principle was applied is—

Consolidated Canal Co. vs. *Mesa Canal Co.*, 177 U. S., 296 (1900).

This was a suit to restrain the defendant from maintaining in its canal a dam in such a way as to impede the flow of water in complainant's canal or to destroy a certain water-power claimed by the complainant.

A part of the finding of the Court below was as follows:

> "A further result of the erection of the water in appellant's canal below the division gates was to *very slightly, if at all,* impede the flow of water in appellant's canal above the division gates and thereby detract very slightly from the carrying capacity of appellant's canal.
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> "The cost of the reconstruction of the canal from Ayres' head gate to the division gates exceeded ten thousand dollars, and the water-power created at the fall was about equal to about forty horse-power."

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>
> "The cost of the reconstruction of the canal from Ayres' head gate to the division gates exceeded ten thousand dollars, and the water-power created at the fall was about equal to about forty horse-power."

Upon this state of facts MR. JUSTICE BREWER, speaking for this Court, said:

> "In view of the finding of the Supreme Court we need not stop to consider any question in respect to the influence of the dam placed by appellee upon the flow of water in appellant's canal, and this, notwithstanding the fact that in the trial of the case much of the testimony, pro and con, was in reference to that matter. We are concluded as to the question of fact by the finding, *and it is familiar law that injunctions will not issue to enforce a right that is doubtful, or to restrain an act the injurious consequences of which are merely trifling.*"

Atchison vs. *Peterson*, 20 Wall, 507, was also an action to restrain the diversion of running water. MR. JUSTICE FIELD said:

> "But whether upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction."

The principle contended for and its application to cases like the present has been most carefully examined and weighed by the Supreme Court of Pennsylvania.

The results stated below were arrived at after elaborate argument and much difference of opinion

among the Judges, in cases affecting materially the prosperity of the State of Pennsylvania.

The doctrine of the Pennsylvania Courts may be stated as follows, in a general way:

The use and enjoyment of a running stream for domestic purposes by lower riparian proprietors must *ex necessitate* give way to the interests of the community in order to permit the development of the natural resources of the country and to make possible the prosecution of a lawful business, as for instance, that of mining coal.

An injunction should not issue but persons should be left to their remedy at law.

> "*An injunction is not of right but of grace, and will never be issued by a Court of Equity when it will inflict a greater injury than it will prevent. In such a case the injured party will be left to his redress at law.*"

The doctrine of the cases about to be cited applies *a fortiori* to the case before this Court, where vast public interests are involved, and where the injunction that has been allowed in effect forbids any State of the Union to use or authorize its own municipal corporation to use water, the most necessary thing to life next after air, if such use results in injury to a person owning lands in another State. Such person would hold in his own hands control of the resources of an entire community.

Pennsylvania Coal Co. vs. *Sanderson*, 113 Penn. St., 126 (1886), was an action on the case to recover damages for loss of a stream of water which flowed through the plaintiff's grounds and was rendered entirely useless for domestic purposes by the defendant's discharging the water into it which it pumped from its coal mines.

This was the fourth time the case had been before the Supreme Court of Pennsylvania, and the law involved was the subject of long argument and careful consideration.

A verdict for substantial damages was rendered in favor of the plaintiff, and the case came before the Supreme Court of Pennsylvania on a writ of error. This judgment was reversed. It was held that one operating a coal mine in the ordinary and usual manner, may, upon his own lands, drain or pump the water which percolates into his mine into a stream which forms the natural drainage of the basin in which the mine is situated, although the quantity of the water may thereby be increased, and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners.

The use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners who purchased their land, built their houses and laid out their grounds before the opening of the coal mine, the acidulated waters from which renders the same entirely useless for domestic purposes must, *ex necessitate*, give way to the interests of the community in order to permit the development of the natural resources of the country and to make possible the prosecution of the lawful business of mining coal.

> "The community does not complain on any grounds. The plaintiff's grievance is for a mere personal inconvenience, and *we are of the opinion that a mere personal inconvenience, arising in this way and under such circumstances, must yield to the necessities of a great public industry*, which, although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country, *trifling inconveniences to particular persons must*

sometimes give way to the necessities of a great community."

The law as thus laid down has been frequently followed in the later cases in the Pennsylvania courts.

One of the principal ones is *Robb* vs. *Carnegie*, 145 Penn. St., 324 (1889).

This was an action in trespass on the case to recover damages for injuries to the plaintiff's land arising from the operation of certain coke ovens by the defendants.

The following is from the opinion of the Court:

> " We think it is true, as held by the judge of the court below, that the evidence in this case would not justify an injunction. It shows a selection of a site as well adapted to the business and as remote from dwellings as any in that region. To enjoin the manufacture of coke at such a site would amount to a prohibition of its manufacture and the destruction of vast allied and dependent industries of immense value to the public as well as to those directly engaged in them. *An injunction is not of right but of grace, and will never be issued by a court of equity when it will inflict a greater injury than it will prevent. In such a case the injured party will be left to his redress at law.* * * *
>
> " It is a fundamental principle of our system of government that the interest of the public is higher than that of the individual, so that when these interests are in conflict the latter must give way. If the individual is thereby deprived of his property without fault on his part, he is entitled to compensation, but if he is affected only in his tastes, his personal comfort or pleasure or preferences, these he must surrender for the comfort and preferences of the many. Thus, highways

> are necessary to the public convenience and comfort. Some noise and dust are necessarily occasioned by the legitimate use of them. This may be disagreeable—perhaps, in some cases, positively harmful—to some one or more of the persons living along them, but for this there is no remedy at law or in equity. It is one of the necessary consequences of subjecting the individual to the public in those things as to which their interests are in conflict."

As noted in the opinion, the principal distinction between the *Sanderson* case and the *Robb* case consists in this: In the *Sanderson* case the Coal Company was using its own land in the only manner practicable to it; that is the only purpose for which it was useful or valuable, to wit, the mining of coal, which could only be carried on by keeping the mines, in some manner, free from water.

In the *Robb* case, however, the injury, if any, resulted from the manufacture of coke at a particular site. This injury, if any, "is in no sense the natural and necessary consequence of the exercise of the legal right of the owner to develop the resources of his property, but is the consequence of his election to devote his land to the establishment of a particular sort of manufacturing, having no natural connection with the soil or the subjacent strata."

The *Robb* case, therefore, is the same in principle as the case at bar, *and we are asking the Court to apply the principle which was applied by the Supreme Court of Pennsylvania, to wit: that the plaintiffs should be left to their remedy in an action for damages and should not be enjoined.*

A similar question came up before the same Court in *Lentz* vs. *Carnegie*, 145 Penn. St., 612, where the rule in

the *Robb* case was adhered to and the riparian owner held entitled to damages.

In the State of Indiana a doctrine similar to that of the Pennsylvania Courts has been adopted.

Barnard vs. *Sherley*, 135 *Ind.*, 547 (1893);
s. c., 151 *Ind.*, 160.
Weston Paper Co. vs. *Pope*, 155 *Ind.*, 394.

FOURTH POINT.

This is not, however, a case of a dispute between private persons merely, but involves public questions of the highest importance. The City in building this dam and diverting the water acts in its public capacity and as an agency of the State of New York, under authority of its Legislature. Its act is therefore in its inception legal and valid.

The erection of this dam and the diversion of this water is a legal and lawful act. It is authorized by chapter 445 of the Laws of 1877 as amended. This act with its amendments is printed in full as an appendix to this brief. The title of the act as amended by Laws of 1879, chapter 516, is as follows:

> "An Act to provide a further supply of pure and wholesome water for the city of New York, and to provide for perfecting and perpetuating the right and title of the city of New York to property, water, water rights and privileges heretofore taken or used or which may be hereafter taken or used by the said city to increase the supply of pure and wholesome water for the use

of the said city, and to *provide for the payment and extinguishment of all claims or damages growing out of such taking or using.*"

It will be seen that the title is in the very broadest terms, and that the Legislature evidently intended to give to the City of New York all the power that the State of New York can give for such purposes.

In the first section the City is authorized in the manner prescribed in the act, "to acquire all rights, titles and interests in and to such real estate by whomsoever the same may be held, enjoyed or claimed, and to pay for and extinguish all claims and damages on account of such rights, titles or interests growing out of such taking or using.

It will be observed that this statute is sufficient to make the City of New York liable for damages suffered, not only to residents in or citizens of the State of New York but to any other persons.

The scheme of the act provided for the acquisition of rights, extinguishment of claims and the amount of compensation by agreement; or, if that could not be done, by the application to a Court for the appointment of Commissioners and the payment of such compensation as the Court should appoint.

If by reason of the fact that certain persons injured by the exercise of the rights conferred by this statute are residents of another State and the laws of New York cannot operate directly as an exercise of the right of eminent domain upon them, then this Court, in the exercise of its equitable powers, should aid in carrying out a necessary public work and not allow it to be defeated by technical difficulties.

As was written by Holmes, *C. J.*, in *Mulhall* vs. *Fallon*, 176 Mass., 266 (1900):

"It is true that legislative power is territorial, and that no duties can be imposed by statute upon persons who are within the limits of another State. *But rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objections, there is nothing to hinder their accepting what is offered.*"

To apply the above to the present case, the State of New York offers to the complainants full compensation in damages for any injury it has incidentally caused them in making use of its own resources for the most necessary public purposes. Will they be heard to say in a court of equity: "We decline to negotiate. We refuse to accept any sum of money whatever. We insist on our technical right to prohibit the State of New York from taking this water, no matter what its necessities?"

It appears from the testimony that all the land required in the State of New York has been acquired under this act and paid for, and that many claiming damages in Connecticut have been settled with.

It is thus established that the dam in question has been built and the diversion of water taken place under and by virtue of a statute of the State of New York, authorizing the City of New York to do the acts complained of in this case. This statute permits the exercise of the right of eminent domain in the fullest manner that the law of any State could authorize such action, and provides means by which complete and adequate compensation must be made to any person whose property rights are damaged.

We may add here that there are other somewhat similar statutes under which the City might at the beginning of this action or now exercise rights of eminent domain for securing an adequate water supply. These statutes, though not offered in evidence, are

public statutes of the State of New York, of which this Court will take judicial notice, as we understand the law.

Laws of 1883, chap. 490 (The Aqueduct Act).

Laws of 1893, chap. 189 (Sanitary Protion of the Water Supply).

Laws of 1882, chap. 410 (The Consolidation Act).

Laws of 1901, chap. 466 (The Amended Greater New York Charter).

In connection with this legislation, we refer to the two following cases:

The United States vs. *Great Falls Mfg. Co.*, 112 U. S., 645 (1884).

In this case certain property was taken by the officers or agents of the United States, pursuant to an Act of Congress, as private property for public use, in order to supply the City of Washington with water by means of an aqueduct from the Great Falls of the Potomac.

The following is from the opinion of the Court:

> "We are of the opinion that the United States having by its agents, proceeding under authority of an Act of Congress, taken the property of the claimant for public use, are under the obligation imposed by the Constitution to make compensation. The law will imply a promise to make the required compensation where property to which the Government asserts no title is taken, pursuant to an Act of Congress, as private property to be applied for public uses, such an implication being consistent with the constitutional duty of the Government, as well as with common justice. The claimants' cause of action is one that arises

out of an implied contract within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any 'contract, express or implied, with the Govern-'ment of the United States.'"

This case is authority for the proposition that the State having authorized The City of New York to acquire this property and to pay for it, an implied contract has arisen which would be enforcible in the courts, so that the plaintiffs in this case would have an action on implied contract by virtue of the Law of 1877 *against The City of New York for any damages they may have suffered by the diversion.*

Kaukauna Co. vs. *Green Bay Canal Co.*, 142 U. S., 254 (1891).

This was an action for an injunction against maintaining a certain embankment. The injunction was denied and the judgment was affirmed by the Supreme Court.

The case is authority for this proposition in general: Where the statute provides a definite and complete remedy for obtaining compensation that remedy is exclusive, but if the statutory remedy be incomplete or imperfect, the owner is not thereby debarred from his common-law remedy and may recover his damages in an action of trespass or ejectment.

FIFTH POINT.

The State government has entire control over non-navigable waters within its limits, and hence may change or abrogate the rules of the common law relating to such waters. The control of navigable waters was vested by the Federal Constitution in the general government, leaving the control of non-navigable waters in the original States, hence it follows that the State may pass such laws as to the exercise of the right of eminent domain over such waters as it pleases. This it has done in the present case, as we have seen, by passing condemnation laws authorizing the City to exercise the right of eminent domain on paying compensation. The construction, therefore, of this dam and the diversion of water were duly authorized.

By the Constitution of the United States, the control of navigable waters and to what extent interference therewith shall be allowed is vested in the Federal Government.

Even as to navigable waters, however, the control over the same by a State within its own boundaries remains in the State, so long as the action that may be taken by the State is not inconsistent with the Federal laws, and until Congress may legislate in relation thereto.

As to non-navigable waters, however, the jurisdiction and control of the same remain in the State Government as to waters within its own territory.

As to such waters, it has absolute and complete control thereof, and any action which the State may take

in reference thereto will not be interfered with by the Federal courts.

That the control of non-navigable waters remained vested in the original States has been taken for granted in all of the decisions.

There are a number of cases, however, relating to obstructions of navigable waters which throw light upon the general subject of this litigation.

In *Willson* vs. *The Black Bird Creek Marsh Co.*, 2 Pet., 245, the defendants were incorporated under a Delaware statute and empowered to hold and improve certain marsh lands, and were authorized for that purpose to make a dam across the Black Bird Marsh Creek. They did so, and the plaintiffs being the owners of a sloop, broke down the dam and the company sued them in trespass.

The following is from the opinion of CHIEF JUSTICE MARSHALL:

> "The Act of Assembly by which the plaintiffs were authorized to construct their dam shows plainly that this is one of those many creeks passing through a deep, level marsh, adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. *Measures calculated to produce these objects, provided they do not come into collision with the powers of the general Government, are undoubtedly within those which are reserved to the States.* * * *
>
> "If Congress had passed any act which bore upon the acts in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout

the lower country of the Middle and Southern States, we should feel not much difficulty in saying that a State law coming in contact with such act would be void. But Congress had passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States, a power which has not been so exercised as to affect the question. We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek can, under all the circumstances, be considered as repugnant to the power to regulate commerce in its dormant state or as being in conflict with any law passed on the subject."

See also—

Gilman vs. *Philadelphia*, 3 Wall., 713.
Miller vs. *New York*, 109 U. S., 385.
Cardwell vs. *Bridge Co.*, 113 U. S., 205.
Transportation Co. vs. *Chicago*, 99 U. S., 635.
Lake Shore and Michigan R. R. vs. *Ohio*, 165 U. S., 365.
N. Y., N. H. & H. R. R. vs. *New York*, 165 U. S., 628.
Covington Bridge Co. vs. *Kentucky*, 154 U. S., 204.
Kaukauna Water Power Co. vs. *Green Bay Co.*, 142 U. S., 254.
Willamette Iron Bridge Co. vs. *Hatch*, 125 U. S., 1.

In *Escanaba Company* vs. *Chicago*, 107 U. S., 678, it was held that non-navigable waters are left within the jurisdiction of the State, but navigable waters are under the United States control, "*but the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will*

promote the peace, comfort, convenience and prosperity of their people," etc.

It is, of course, within the power of the several States to change the common law in general within their own borders. That they may do so with regard to the common law of non-navigable streams, is settled by the decisions relative to the Western rule of "prior appropriation" of waters.

In many of the Western States and Territories it was found at an early day that the common law doctrines were wholly inapplicable to local conditions, especially where water was conveyed to a distance from a stream for use in mining operations. An entirely different rule of law therefore grew up by custom of miners in California and elsewhere, which ultimately found expression in the Statutes.

See—

Gould on Waters, § 228.
Atchison vs. *Peterson*, 20 Wall., 507,

where the subject is lucidly discussed by MR. JUSTICE FIELD.

This power is affirmed in an important decision, on which alone, we think, the decree appealed from should be reversed.

United States vs. *Rio Grande Dam Irrigation Co.*, 174 U. S., 690 (1899):

This was a bill in equity, filed by the Attorney-General of the United States, to restrain the defendant from constructing a dam across the Rio Grande river within the Territory of New Mexico, and by virtue of its laws, and from appropriating the waters of that stream for the purpose of irrigation.

The following is from the opinion of the Court:

"The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent. * * *

"While this is undoubted, and the rule obtains in those States in the Union which have simply adopted the common law, *it is also true that as to every stream within its dominion a State may change this common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise.* Whether this power to change the common law rule and permit any specific and separate appropriation of the waters of a stream belongs also to the Legislature of the Territory, we do not deem it necessary for the purposes of this case to inquire. We concede, *arguendo,* that is does.

"Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet limitations must be recognized: First, that in the absence of specific authority from Congress, a State cannot, by its legislation, destroy the right of the United States as the owner of lands bordering on the stream to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the Government property; second, that it is limited by the superior power of the general Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general Government over interstate commerce and its natural highways, vests in that Government the right to take

all needed measures to preserve the navigability of the navigable water-courses of the country, even against any State action.

"It is true there have been frequent decisions recognizing the power of the State, in the absence of Congressional legislation, to assume control of even navigable water within its limits, to the extent of creating dams, booms, bridges and other matters which operate as obstructions to navigability. The power of the State to thus legislate for the interest of its own citizens is conceded, and until, in some way, Congress asserts its superior power and the necessity of preserving the general interests of the people of all the States, it is assumed that said action, although involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge. A long list of cases to this effect can be found in the reports of this Court."

This fully sustains our contention in the present case. So far as it relates to navigable waters and the jurisdiction of the United States over the same, it, of course, has no application here. But it is ample authority for the proposition that a State may change the common law rule as to running water and permit the appropriation of the same for such purposes as it deems wise, and that when it has done so such action is not subject to challenge by any one but the United States.

SIXTH POINT.

An injunction will not ordinarily issue to restrain the performance of an act which is done under authority of law.

In the present case the State of New York has authorized the City of New York to take and appropriate the waters of the Byram river, within its own boundaries, for the purpose of supplying its citizens with pure and wholesome water. The State has also provided an ample and complete method of compensating any one who may be injured by the diversion of water.

The legal remedy of the complainants is clear and ample; whatever damage they may have suffered was under authority of a sovereign State; there has been no direct taking of their property, and the injury complained of is, in substance, only the infliction of damage in respect of their complete enjoyment of their land. Under these circumstances an injunction should not issue.

Osborne vs. *Missouri Pacific Railway Co.*, 147 U. S., 248 (1892):

This was a bill in equity against the railroad company by the owner of a building on the public street in St. Louis, upon which the company was about, under competent municipal authority, to lay down tracks for use in running cars drawn by steam power. It was held that the complainant had an adequate remedy at law for the injuries complained of, and was not entitled to the injunction.

The following is from the opinion of the Court:

> "Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy where the

injury is destructive or of a continuous character or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if indeed, relief may not be awarded *ex debito justitiae*.

"But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial and the remedy at law in fact inadequate before restraint will be laid down upon the progress of a public work. And if the case made discloses only a legal right to recover damages rather than to demand compensation, the court will decline to interfere.

"In *McElroy* vs. *Kansas City*, 21 Fed. Rep., 257, which was an application for an injunction to restrain the grading of a street in front of the complainant's lot, Mr. JUSTICE BREWER, then Circuit Judge, considered under what circumstances a chancellor could grant such relief. It was ruled that, if the injury which the complainant would sustain from the act sought to be enjoyed could be fully and easily compensated at law, while, on the other hand, the defendant would suffer great damage, and especially if the public would suffer large inconvenience, if the contemplated act were restrained, the injunction should be refused, and the complainant remitted to his action for damages."

New Haven Water Co. vs. *Wallingford*, 72 Conn., 293 (1899):

This was an action brought to restrain the Borough of Wallingford from diverting the waters of the Pine

river. The plaintiff was a private corporation engaged in supplying the City of New Haven with water, and the defendant was a municipal corporation. The following is from the opinion:

> "The plaintiff next claims that, as a riparian owner, it is entitled to the full flow of the river, and to an injunction to restrain the defendant from diverting the water, at least until it pays damages for such diversion. It is conceded that the defendant has not paid damages for diversion of the water from the plaintiff's property, and that it is liable in damages for such diversion. But the real question in this case does not relate to the right of the plaintiff as riparian owner to damages, nor to the amount of such damage, nor even to its right under certain circumstances to an injunction restraining the diversion until damages have been paid, but it relates to the very different question whether the Court erred in refusing to grant an injunction upon the facts found. The answer to this question is to be looked for in the several facts found. The plaintiff bought its property in 1897, with full knowledge of what the borough had done prior to that time in this matter, and with full knowledge of all the other appurtenant facts put upon the record. The water diverted is necessary for the uses of the borough, and to enjoin the defendant from diverting it might cause great hardship. This stream is practically the only source of additional supply open to the borough. It is found that it is doubtful whether the damage to riparian owners below the pumping station will be more than nominal; the borough has tried to settle for them, and is ready and willing, and abundantly able to pay them as soon as the amount is ascertained. Upon the facts found

upon this part of the case, the injunction was properly refused."

Harding vs. *Stamford Water Co.*, 41 Conn., 87 (1874):

In the *Harding* case a woolen mill had been established on a water-course which it used in part for power and in part for washing wool, the supply in dry season being sufficient only for the latter. Afterward a corporation, under a charter from the Legislature, purchased a tract of land four miles above on the stream, and at that point diverted a portion of the water to the Borough of Stamford for the domestic use of the inhabitants, and for manufacturing and other purposes. The charter contained a provision that the corporation should be liable to no damage by taking the water. The owners of the mill brought a petition for an injunction, pending which the corporation procured an amendment to its charter providing for compensation for property taken. The diversion of the water was no damage to the petitioners, except during the dry season.

(1) Held that the diversion was one which the respondents as riparian proprietors had no right to make.

(2) That the provision of the charter giving them the power to take the water without making compensation was unconstitutional and void.

(3) That in view of the amendment of their charter providing for compensation, the Court, in its discretion, would allow the respondents time to make compensation, and if not made that a perpetual injunction should be granted.

Platt vs. *The City of Waterbury*, 72 Conn., 531 (1900):

This was a suit to restrain the defendant from polluting the Naugatuck river, for damages and injunction,

etc. It was held that the discharge of sewage into the river was an unreasonable use of the stream and could not be acquired by prescription.

It was held that where the sewage of a city polluted a stream so as to destroy the value of plaintiff's manufacturing plant located thereon, the plaintiffs were entitled to maintain an injunction against the city to compel it to provide other means for disposing of its sewage within ample time, or to compensate plaintiffs for injuries sustained to their property. The following is from the opinion of the Court:

> "The appropriation of the river to carry such substances to the property of another is an invasion of his right of property. When done for a private purpose it is an unjustifiable wrong. *When done for a public purpose it may become justifiable, but only upon payment of compensation for the property thus taken. Public necessity may justify the taking, but cannot justify the taking without compensation.*"

Attorney-General vs. *Paterson,* 58 N. J. Eq., 1; reversed in 60 N. J. Eq., 385 (1900):

This was an information and bill of complaint filed on behalf of the owners of certain lands along the banks of the Passaic river to restrain the City of Paterson from depositing or discharging its sewage into the Passaic river and from constructing new sewers with outlets into said river.

The sewers in question were constructed by authority of the Charter of the City of Paterson and other acts of the New Jersey Legislature.

The Chancellor granted the injunction prayed for to the extent of prohibiting the discharge of sewage through

any public sewers "which do not now discharge directly or indirectly into said river."

On appeal to the Court of Errors and Appeals this decree was reversed. The Court admitted that the riparian owners above tide water had a right to prevent pollution of the stream. They admitted that ordinarily an injunction should issue to restrain such a wrong. But they refused, in view of the situation of the parties to this suit, to interfere in that manner.

We quote from the opinion as follows:

> "Ordinarily where the riparian owner is injured by an unlawful diminution of the quantity of water, or by its excessive pollution, when his legal right is established, he is entitled to the exercise of the injunction power of a court of equity.
>
> "Whether in this case the restraining order of the Court should be interposed for the protection of the riparian owners above tide-water, is the remaining question to be considered.
>
> "That question must be solved by determining whether in the situation of the parties here there is the presence of such circumstances and such equities as may justify this Court in withholding its restraining arm.
>
> "On the one hand, the riparian owner is entitled to redress in respect of the deprivation of his property.
>
> "On the other hand, the City of Paterson, at an enormous expense, has put into operation under legislative authority, and for a long series of years has used and enjoyed a system of sewerage which accommodates a population of over one hundred thousand people.

"By the restraint prayed for, this sewerage system will be suddenly destroyed, and the homes of this multitude of people will be rendered perilous to health and life, and unfit for occupancy.

"While the city cannot, upon this continued acquiescence of these riparian owners, predicate the right to deprive them of their property in the stream, yet in view of such acquiescence, and the magnitude of the injury which would fall upon the public by prohibiting the use of the sewers, it would be inequitable to enjoin if relief can otherwise be afforded. The relators are here asking equity and they must do equity.

"A substituted remedy by giving them adequate compensation for their injury would be a just disposition of the controversy.

"The granting or refusing of an injunction is a matter resting in the sound discretion of the Court. Where it would cause great injury to the defendants and might be of serious detriment to the public, without corresponding advantage to the complainant, it will not be granted. * * *

"If these complainants amend their bill, or file a new bill asking for an injunction, unless the city will consent to make such compensation for the diminution in the value of their lands as shall be ascertained to be just, such equitable relief can be given to them.

"The injunction should be vacated and the record remitted to the Court of Chancery, and the case proceeded with in accordance with the views herein expressed."

Rockport Water Co. vs. *Inhabitants of Rockport,* 161 Mass., 279:

In the *Rockport* case it was held that under a statute authorizing a town to take by purchase or otherwise the franchise or corporate property of a water company "on payment to said corporation of the actual cost of its franchise, works," etc., a payment is not a condition precedent to the taking, and the water company cannot maintain a bill in equity to enjoin the town after the taking and before payment from preventing the laying of water-pipes by the company.

SEVENTH POINT.

As to certain decisions where water rights in adjacent States were affected.

We believe it is substantially conceded by the learned counsel for the complainants that no case can be found where an injunction has issued in a situation like the present. At the risk of making this brief unduly long, but with the hope of assisting the Court, we print statements of the substance of all the important cases which seem to us to have a bearing upon this point.

In Massachusetts the difficulty seems to have been solved by allowing the person in the adjacent State injured by the diversion of waters in Massachusetts to sue in tort in the courts of Massachusetts.

It seems to be tacitly assumed that an injunction would not lie.

Bannigan vs. *City of Worcester,* 30 Fed. Rep., 392 (1887):

In this case the complainants were citizens of Rhode Island and owners of mill property on the banks of the Blackstone river, in that State.

The defendant, under a Massachustetts statute, had taken its water supply from the Tatnuck Brook, a tributary of the Blackstone river, in Massachusetts.

The plaintiffs, pursuant to the said statute, filed their petitions in the Massachusetts court, praying for the appointment of Commissioners and the amount of damages.

The plaintiff then removed the case into the United States Circuit Court for the District of Massachusetts. This case and several somewhat similar ones were before the Court on motions to remand and on demurrers to the petitions.

The following is from the opinion:

> "I am of opinion, however, that it is the duty of this Court to entertain the suit and to ascertain and enforce the rights of the plaintiffs by the proceeding which the State Law prescribed, whether it be by the usual process of law actions or by a special process prescribed for the occasion. The defendant argues that the appointment of Commissioners properly belongs to the State Court, and that a controversy removal to the Federal Court does not arise in these cases, unless there should be an appeal to a jury after the award of the Commissioners comes in. But I see no reason why this Court cannot administer relief by the appointment of Commissioners, as well as by trying the question of damages with a jury. * * *
>
> "On the demurrer the defendant alleges that the petitions show no case for relief under the statute.

The argument is that since the lands of the petitioners are in Rhode Island, and their rights in the water of Tatnuck Brook are appurtenant to those lands, the petitioners cannot claim a remedy under this statute unless it be held to have extra-territorial effect, which, of course, is inadmissible. I cannot agree with this argument. It has been held by the Supreme Court of Massachusetts that the owner of land in an adjoining State may have, as appurtenant to such land, an interest in land or water in Massachusetts, which may be protected by suit in the courts of that State (*Manville Co.* vs. *City of Worcester*, 138 Mass., 89). I am strongly inclined to the opinion that the decision in that case is of binding force on this Court in the case at bar; and, even if it be not so, I am inclined to follow that case as being of high authority, and well supported by the reasoning of the opinion."

Manniville Co. vs. *City of Worcester*, 138 Mass., 89:

This was an action of tort, for diverting the waters of a natural stream in Massachusetts, and preventing the same from coming to the plaintiff's mill in the adjoining State of Rhode Island.

It was held that such an action could be maintained in the State courts of Massachusetts.

The following is from the opinion of HOLMES, *J.*:

"The defendant's counsel contended, in the first place, that such rights as the plaintiff claims cannot extend beyond the Rhode Island line, and went the length of maintaining that a servitude cannot be created in one State in favor of lands in another. We are unable to agree to this proposition upon either principle or authority. Every decision and dictum

that we have found, bearing on the precise point, is the other way (citing cases) * * * .

"We think that the cases which recognize civil, and even criminal liability for flowing land in one State by means of a dam in another, are hardly less pertinent (citing cases). The defendant admits these cases to be law and tries to distinguish them. But we cannot assent to the distinction between discharging and withdrawing water. The consequence in one case is positive, in the other negative; but in each case it is the consequence of an act done outside the jurisdiction where the harm occurs, and the consequence is as direct in the latter case as in the former. The right infringed in the former case is called absolute ownership, in the latter, easement; *but the laws of Rhode Island, which make a man owner of a tract of land there, have no more power to diminish freedom of action in Massachusetts than any other of its laws.* A concurrence of the laws of both States is as necessary in that case as in the one at bar, to create a liability which can be enforced in either State consistently wtih principle. Such a concurrence presents no technical difficulties, and, if the substantive end to be attained is a proper one it will be recognized and acted on here, as we have no doubt it would be in Rhode Island if the position of the parties were reversed.

"Of course, the laws of Rhode Island cannot subject Massachusetts land to a servitude, and, apart from any constitutional considerations, if there are any, which we do not mean to intimate, Massachusetts might prohibit the creation of such servitude so it might authorize any acts to be done within its limits, however injurious to lands or persons outside them. But it does not do either. It has no more objection to a citizen of Rhode Island owning an ease-

ment as incident to his ownership of land in that State than it has to his owning it in gross, or to his purchasing lands here in fee. Questions might be conceived as to the transfer of such easements, but they do not arise here (Slack *vs.* Walcott, *ubi supra*). So far as their creation is concerned, the law of Massachusetts governs, whether the mode of creation be by deed or prescription, or whether the right be one which is regarded as naturally arising out of the relation between the two estates; being created, the law of Rhode Island, by permission of that of Massachusetts, lays hold of them and attaches them in such way as it seems fit to land there, Massachusetts being secured against anything contrary to its views of policy by the common traditions of the two States and by the power over its own territory which it holds in reserve."

Brickett vs. *Haverhill Aqueduct Co.*, 142 Mass., 394 (1886):

This was an action in tort for obstructing and diverting a water-course. The act of the defendant was done under authority of the statute of Massachusetts, authorizing an aqueduct corporation to take and use waters of certain ponds to supply the inhabitants of a town with water under certain conditions.

The plaintiff owned lands situated partly in Massachusetts and partly in New Hampshire, through which the stream flowed. He contended that the effect of taking the water and building the dam was to diminish the flow of water through his land, and brought this common-law action of tort for diversion of the water.

It was held that so far as the acts done were within the authority of the statute, the damages must be ascertained

in the manner provided by statute; but where the proceeding under the statute violates the provisions thereof and causes damage to the land-owner, the latter may maintain an action of tort, and it is immaterial that the lands so injured is situated in another State.

The following is from the opinion:

> "We do not deem it important that the land of the plaintiff which was injured was outside of the limits of this State. The language of the act is general, and puts all water rights upon the same footing and applies to the proprietor outside the State. Such proprietor certainly has no greater rights than the citizen whose lands or water rights within the State are injured by the acts of the defendant under authority of the Legislature. Whether the constitutional objection we have considered would be open to a citizen of another State whose lands or water rights in that State are injured we need not discuss or decide."

The following were cases cited below by the learned counsel for the complainant as sustaining his contention.

It will be evident from the summary of these cases, which we have tried to make entirely fair, that none of them pass upon the vital points of this case.

The Holyoke Water Power Co. vs. *The Connecticut River Co.*, 22 Blatch., 131 (1884); S. C. 20 Fed. Rep. 71:

The defendant was a Connecticut corporation incorporated "for the purpose of improving the boat navigation of Connecticut river," a navigable stream, and to remove certain obstructions from the channels and bars of said river, to construct dams for the purpose of entering the locks, but in such a way as not to prevent the convenient passage of boats, lumber and fish.

Under this charter the defendant built a dam in the State of Connecticut, at Enfield Falls, on the Connecticut river.

The plaintiff was incorporated under the laws of Massachusetts for the purpose of upholding and maintaining a dam across the Connecticut river above the defendant's dam and in the State of Massachusetts.

The plaintiffs claimed that the raising of the dam by the defendant would set back the water upon the plaintiff's works and diminish the effective head of its fall, and hence brought this bill for an injunction. A decree was granted against a further raising of the dam and against the constructing of a new dam to a greater height than the height occupied by the present structure.

The following is from the opinion of SHIPMAN, *J.*:

> "The defendant insists that, inasmuch as the State of Connecticut authorized the addition to the dam for the purpose of improving the navigation of Connecticut river within the limits of the State, any consequential injury not amounting to the taking of land, which is occasioned in the exercise of ordinary care by reason of such improvement, to the land of a riparian proprietor, is *damnum absque injuria;* and it may be considered as setled that, where a State, by itself or by its agents, in the construction of works authorized or directed by the Legislature of such State, for the benefit of the navigation of a navigable river within its borders, causes, without malice and in the exercise of ordinary care, a necessary consequential injury to land within its borders, no relief will be granted against such injury. The State and Federal courts concur in the assertion of this principle. * * *

"In this case the injury will be caused to property beyond the limits of Connecticut, and the question arises whether the doctrine which has been asserted is applicable to this state of facts. This question has never, so far as I can ascertain, been decided by the courts of this country. The question has arisen whether, by virtue of the right of eminent domain, one State can take, or subject to public use, land in another State, and the decisions have naturally been against such a power (Farnum *vs.* Canal Co., 1 Sumn., 46; Salisbury Mills *vs.* Forsaith, 57 N. H., 124; Wooster *vs.* Great Falls Co., 39 Me., 246; United States *vs.* Ames, 1 W. & M., 76). In two cases which have recently arisen in Federal courts, and which involved the right of a State to regulate or to improve the navigation of a river wholly within its limits, the judges have carefully limited their decisions to the facts in the cases (Escanaba Co. *vs.* Chicago, 107 U. S., 678; Huse *vs.* Glover, 15 Fed. Rep., 296). Important suggestions which bear upon the questions in this case are made by Judge Treat in Rutz *vs.* St. Louis (7 Fed. Rep., 438) and by Mr. Justice McLean, in Palmer *vs.* Commrs. of Cuyahoga Co. (3 McLean, 226).

"The rule which has been referred to is based upon the principle that the improvement of the navigation of navigable rivers within a State is a part of the State's governmental duties, and that the work which is done toward such improvement is done in the discharge of the governmental powers of the State, and that the land of the riparian proprietor within the State is subject to the just exercise of this power, and that when the State undertakes to exercise its governmental power the public good is paramount to the consequential injury to land which is incidentally and necessarily affected by the

improvement. The land is under the jurisdiction of the State and the State derives the power to inflict remote and consequential injuries upon it by virtue of such jurisdiction. The owner of land abutting upon a navigable river owns it subject to the right of the State to improve the navigation of the river, because the land is within the governmental control of the State, but it seems to me that the State obtains by virtue of its governmental powers no control over or right to injure land without its jurisdiction. Jurisdiction confers the power and the right to inflict consequential injury, but where no jurisdiction exists the right ceases to exist. It is a recognized principle that the statutes of one State in regard to real estate cannot act extra-territorially. As Connecticut has no direct jurisdiction or control over real estate situate in another State, it cannot indirectly, by virtue of its attempted improvement of its own navigable waters, control or subject to injury foreign real estate. If this resolution is a bar to an action for any consequential injury to land or to rights connected with land, in Massachusetts, Connecticut is acting extra-territorially."

It is to be observed of this case that it is entirely between private persons. No private rights were involved, nor was it proposed to give compensation to the plaintiff, nor, in fact, were there any means provided for doing so, and it might also be added that the stream was a navigable one.

The claim was that the injury could be inflicted without liability for damages.

The case is thus radically different from the one now before the Court.

Rutz and others vs. *City of St. Louis,* 7 Fed. Rep., 438 (1881):

This was an action at law for the recovery of damages in the Circuit Court for the Eastern District of Missouri. Damages were said to have been caused to the plaintiff's land in the State of Illinois, opposite the City of St. Louis, bordering on the Mississippi river, because of a dyke built on the Missouri shore unlawfully, which dyke caused the plaintiff's land to be washed away.

One of the points raised was that the action was a *local* one and hence not in the proper court.

The following is from the opinion of JUDGE TREAT:

> "And hence, if the common law rule as to *local* actions must prevail, the plaintiff is remediless, practically, however great the wrong sustained, because no legal service could be there had.
>
> "It seems that the old rule as to *local* actions should not be considered applicable to suits of this nature. Where there is a wrong, there must be a remedy. The jury in this case was caused by defendant acting within another jurisdiction.
>
> "*Second*—Defendant contends that the dyke built by it was under authority of Missouri statutes, and consequently was not unlawful, despite the averments in plaintiff's petition to the contrary.
>
> "Can such a proposition be raised by demurrer to the petition? If the United States courts are bound to take notice of public acts of every State, and the State of Missouri by statute authorized the dyke to be erected, then it was a lawful structure, intra-territorially, if properly erected, and does not fall within the rules concerning nuisances (citing cases)."

The rest of the opinion is unimportant in this connection, dealing with the question as affected by the navigability of the Mississippi river.

Farnum vs. *Blackstone Canal Corporation,* 1 Sumner, 146 (1830):

This was an action to compel the proprietors of the canal to reduce the height of a dam across the Blackstone river, which had been raised by them whereby the operations of the plaintiff's mill were impeded, and for a perpetual injunction.

In the head note of this case there is the following *quære:*

> "If the Legislature of that State can authorize a dam locally in that State to be raised so as to flow back a public river running into another State to the injury of mill privileges, locally situate in the latter State?"

In this case the questions arose between two corporations created by adjacent States, with the same name, and authorized to construct a canal in each of the States, respectively. The main question in this case was whether the acts of incorporation authorized the act which was complained of.

Here, also, it would seem to have been contended that there was no liability for damages and no means of compelling payment thereof.

U. S. vs. *Ames,* 1 Woodbury & Min., 76 (1845):

This was an action in the Circuit Court of the United States for the First Circuit, and was in trespass on the case for flowing land of the United States situated in Springfield over which jurisdiction had been ceded to them by the State of Massachusetts. The question simply was

whether the laws of Massachusetts applied as to flowage to lands that had been ceded to the United States Government. The case is of no application to the present one.

Stillman vs. *White Rock Manufacturing Co.*, 3 Woodbury & Min., 538 (1845):

This was an action for an injunction against the diversion of water. The owner was a citizen of Connecticut, and the defendant a corporation in Rhode Island. The plaintiffs owned an undivided half of certain land in Connecticut, and a mill dam over the Pawtucket river, and one-half the water-power thereof, the said river being the dividing line between Rhode Island and Connecticut. The defendants owned the eastern half of another dam 250 rods above this one, and the eastern half of this one, both being situated in the State of Rhode Island. They also owned one-half the power of the river. The defendant company made a canal from the upper dam of the easterly side of the river and diverted a portion of the waters above it around the lower dam and running then into the river below. This was used to the injury of the complainant, and hence they prayed for an injunction.

The following is from the opinion of the court:

> "If both sides of the river were situate in the same State, under the same laws, or were within the jurisdiction of the same courts, then to discriminate as to the precise extent and legality of the injury for which the action was brought would often be of little importance.
>
> "But here, unfortunately, different States and different laws in some respects govern the two sides, and different circuits of this Court possess jurisdiction on each side no less than different State Courts.

"It becomes necessary, therefore, to ascertain now what is the interest, if any, which the complainants, by owning land on the Connecticut side of the river, are entitled to in the water on the Rhode Island side; and, indeed, this becomes almost the whole gist of the controversy.

"After careful inquiry this interest seems to me to be such a corporeal easement or right as has just been described, to an individual half of the water on that side, as well as on the other side. A fence or embankment cannot be usually made in the middle of a large stream where the right to the soil terminates; and if made, it would not correspond with the true interests each owner on the banks has to some extent in all the flowing water between those banks. Hence, it is reasonable to regard these interests in the whole stream to be an undivided half, or tenancy in common, and if either side uses or takes out more than half, or at a place above removes and diverts large quantities from coming at all to the dam where the complainants are interested, their proportionate interests in the whole stream are injured, and an action of some kind or other must lie for redress somewhere. * * * Probably different forms of actions may lie as redress is sought for different views of the injury, and these different actions may be brought properly in one State or the other, as they relate more immediately to the acts done as affecting the land and mills complainants own in Connecticut, or as affecting the undivided share in the water on the Rhode side which the complainants also own. The canal here being on the Rhode Island side and first injuring the rights of the complainants there to an undivided one-half of the stream would seem to justify

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"After careful inquiry this interest seems to me to be such a corporeal easement or right as has just been described, to an individual half of the water on that side, as well as on the other side. A fence or embankment cannot be usually made in the middle of a large stream where the right to the soil terminates; and if made, it would not correspond with the true interests each owner on the banks has to some extent in all the flowing water between those banks. Hence, it is reasonable to regard these interests in the whole stream to be an undivided half, or tenancy in common, and if either side uses or takes out more than half, or at a place above removes and diverts large quantities from coming at all to the dam where the complainants are interested, their proportionate interests in the whole stream are injured, and an action of some kind or other must lie for redress somewhere. * * * Probably different forms of actions may lie as redress is sought for different views of the injury, and these different actions may be brought properly in one State or the other, as they relate more immediately to the acts done as affecting the land and mills complainants own in Connecticut, or as affecting the undivided share in the water on the Rhode side which the complainants also own. The canal here being on the Rhode Island side and first injuring the rights of the complainants there to an undivided one-half of the stream would seem to justify

an appropriate remedy there for that particular wrong.

"The injury, thus far, and in this view, may be regarded as committed on interests possessed in the water beyond the centre of the stream, and not entirely on and to the mill situated upon one of the banks, or to merely that half of the stream which is contiguous. Such interests may exist in water and its use (2 N. Hampr., 259).

"The first and direct injury, then, is to the easement and consequent rights existing beyond the centre. The next consequential injury would be to the mills and land adjoining the stream before reaching the centre of the Connecticut side, and a proper remedy for that would lie there. Thus, a right-of-way on land in one State to a farm in another is an interest situated in the first State and an obstruction may be there prosecuted. * * * The chief error in the position of the respondents is in supposing that the plaintiffs have no rights whatever beyond the centre of the river or no interests to be protected there. If this be the correct view which I have adopted, then no question arises as to jurisdiction over the subject of this bill by this Court any more than as to the code of laws that must control our decision. It must be the code beyond the centre when the action is brought for a violation of the complainant's rights existing beyond the centre, and which is here the code of Rhode Island, and jurisdiction must be and properly is here for an injury done there; and hence the prosecution must be for that in the courts of Rhode Island, or if pursued in the tribunal of the general government, it must be not in the second circuit in Connecticut, but in the first circuit held in the district of

Rhode Island. Nothing can more fully illustrate the propriety of this view in the present instance than some of the incidents to the peculiar remedy by injunction which is sought here. A party is entitled to that remedy in case of great and irreparable injuries inflicted on him if done without right. Yet here this remedy must be sought in Rhode Island or it would be of no use. The canal is situated there which is made to divert the water. The owners of the canal, the supposed wrongdoers, reside there, and an injunction issued in another State or circuit could not be executed there, it being a proceeding *quasi in rem*. The injured party, then, must be deprived entirely of this legal, summary and useful species of redress unless rights and jurisdiction to protect them exist beyond the centre of the stream. * * * But the first act done in the present case was done in Rhode Island, and is proceeded against as a private nuisance erected in Rhode Island. The remedy by injunction is a specific one, or *quasi in rem*, and whether that nuisance be in fact situated in Rhode Island or Connecticut, it must be enjoined against, wherever it is, and there alone, and by the laws existing there alone it must be abated, if at all. Suppose it is proceeded against criminally, it surely may be in Rhode Island, where it is erected and does the injury. Why not, then, if prosecuted in a civil form? * * * It is no answer to all this that some injury is done by this canal to property and rights on the Connecticut side, and for which a real action could not be brought, except in Connecticut, and could not be decided except in conformity to the laws of Connecticut. The complainants in this case have not chosen to resort to such an action anywhere, much less in this State, and, on the contrary, have prayed for an injunction

against the diversion of the water on the Rhode Island side, and by an unwarranted canal used there to remove large quantities of it entirely from the dam occupied in part by the complainants, and it is manifest that this remedy for this evil must be prosecuted in Rhode Island alone, where the nuisance is situated, and where it is to be restrained, or nowhere. * * * These points settled, the whole case is settled."

Note.—The Judge would seem to hold also that the Rhode Island statute of twenty years as to prescription prevailed, and not the Connecticut statute of fifteen years; or, in other words, that the Rhode Island law was to govern and not the Connecticut law.

Note.—It will be observed that no question of public use was raised in this case, nor of eminent domain, nor of right under special State statutes, nor of compensation, the case being determined apparently upon the common law principle relating to flowing waters.

Foot vs. *Edwards*, 3 Blatchford, 310 (1855):

This was an action for damages for an injury to mill property of the plaintiffs situated in Massachusetts by the diversion of a stream of water upon which the mill stood. The act causing the diversion was committed in Connecticut. It was held that the Circuit Court of the United States for Connecticut had jurisdiction of an action by the mill-owner against the person who diverted the water in Connecticut, for damages caused by said diversion.

It would seem, from the clear and satisfactory argument of the Judge, that a suit of this nature might be brought either in the jurisdiction where the wrongful act was done or in the jurisdiction where the land injured was situated.

Crosby vs. *Hanover*, 36 N. H., 404:

This case holds that the laws of New Hampshire as to laying out highways cannot go to the extent of condemning a pier and abutment of a bridge across the Connecticut river in Vermont; but that they can permit taking the franchise and property of an interstate bridge and ferry chartered by the State of New Hampshire, and as such taking would render the pier and abutment valueless, the Court holds that this fact should be taken into consideration in making the award.

Salisbury Mills vs. *Forsaith*, 57 N. H., 124 (1876):

A Massachusetts corporation having erected a dam in Massachusetts on its own land, whereby the water of a stream was set back upon the land of a riparian owner above in the State of New Hampshire, cannot by petition have the damage of such land owner assessed, and have its rights of flowage ascertained and fixed under the New Hampshire act for the encouragement of manufacturers.

> "It is certain that this act can have no extra territorial application or effect. The use and management of Massachusetts real estate cannot be subjected to the control of New Hampshire laws. The Legislature of this State can no more confer upon a Massachusetts corporation the right to build a dam and water mill upon their land or the land of another with its consent in that State, than it can forbid such act there; and so far as I can see they might as well do either or both as to impose terms, conditions and regulations upon the building of such dam and mill as provided by the act. * * * It is one of the plainest elementary rules that no Legislature can extend its laws to territory beyond the borders of its

own State. How, then, can the courts of this State have any jurisdiction over lands and mills in another State? How shall a court in New Hampshire decree that a corporation in Massachusetts may not maintain a dam in that State above a certain height, and if such decree were made, how would the court be able to enforce it?"

See also *Wooster* vs. *Winnipiseogee Lake Co.*, 25 N. H., 525.

In the latter case it was held that the action should be brought where the land injured lies.

Wooster vs. *Great Falls Mfg. Co.*, 39 Me., 246:

This was an action in trespass on the case to recover damages for flowage of land. By a Maine statute it was provided that any man may erect and maintain a water mill and dam to raise water for working it upon and across any stream that is not navigable, upon the conditions therein named, and when such dam is lawfully erected the person sustaining damages in his lands by being overflowed may obtain compensation by complaint, and that no action shall be sustained at common law for recovery of damages for such overflowing of land, except in the manner provided.

To entitle the owners of a dam and mill to the benefits of this statute, the mill as well as the dam must be situated within the limits of this State.

And where the owner of land is damaged by its overflow, by means of a dam erected to operate a mill situated in another State across a river, the boundary of the two States, he may maintain an action for his indemnity at common law.

EIGHTH POINT.

As to what action this Court should take.

It has been already pointed out that the diligence of complainants' counsel has failed to find any direct authority for the position they are necessarily driven to assume. They rest strictly upon the precedents which have long since settled the right of private riparian owners as between themselves.

How far these precedents should be held to be binding in a case like the present, is one of the questions now before this Court.

The common law rule as to non-navigable streams had its origin in England many centuries ago. It was a country abundantly watered. It was sparsely settled. Its population was largely agricultural. No large cities, as large cities are now reckoned, then existed. The modern uses of water for the comfort, and indeed the very existence, of a crowded population were unknown.

In this country and in this age different conditions prevail. Large areas of our territory are useless unless fertilized by irrigation. Great and growing cities must cease to expand unless they can find new sources of water supply. The conditions under which the community lived when the earlier decisions were rendered, have so altered that they are now no longer applicable. It is a familiar and well-settled principle of equity that a restrictive covenant in a deed will not be enforced where conditions have so changed that the restrictions have become so obsolete, vexatious or use-

less as to render enforcement inequitable and oppressive ; but the parties will be left to their remedy at law.

Duke of Bedford vs. *British Museum*, 2 Myl. & K., 552.
Columbia College vs. *Thacher*, 87 N. Y., 311.
Jackson vs. *Stevenson*, 156 Mass., 496.

If this is justice and equity where the breach of a positive contract between parties is concerned, how much more just and equitable is it in cases like the present, where the greatest national interests are involved. The complainants appeal to an ancient rule of law, which may well be allowed to govern in ordinary cases between individuals. But in a case like the one at bar, this Court, we respectfully submit, should take a larger view. Without in the least impairing well-settled principles, it may easily lay down a general rule that will always do ample and exact justice. This Court will still advance *super antiquas vias* if it declines to grant an injunction in any case like the present, where it would be obviously oppressive and inequitable to restrain a public body, acting under the sanction of law, from using for public purposes the water which it finds in its own State, and where the injury to the plaintiffs is relatively small and is capable of full and just compensation by way of damages.

Three courses are open to this Court.

(1) This Court might reverse the decree and dismiss the bill without prejudice to any action the complainants might see fit to take in an action at law for damages or in the procedure under the Act of 1877 (see *Raton Water Works* vs. *Raton*, 174 U. S., 360).

(2) It might remand the case to the Circuit Court to take evidence of what restrictions and conditions could be placed on the use of the dam and water, so that no substantial injury could result to the complainants (see suggestions quoted on page 19 of this brief from the opinion in *Strobel* vs. *Kerr Salt Co.*, 164 N. Y., 303).

(3) It might adopt the course followed by the New York Court of Appeals in the elevated railroad cases. That is, the Court could refer the matter to a Master to take testimony as to the amount of damages, and, after the same have been ascertained, only grant an injunction if the defendants neglect to pay the same within a reasonable time. The Court might also, if the practice will allow, refer the question of damages to a jury.

The course followed in the New York State courts furnishes what, in our judgment, is the best solution of the difficulty.

Pappenheim vs. *Metropolitan Elevated Railroad*, 128 N. Y., 436 (1891):

This action was brought to perpetually enjoin the elevated railroad companies from occupying their railway in front of the plaintiff's premises, and to procure the structure already built there to be removed, and to recover from the defendants the loss and damage sustained by reason of the past operating of the railroad. It was found that the defendants were authorized by certain acts of the Legislature to exercise the right of eminent domain and thus to acquire plaintiff's easements, if necessary, and that the defendants had like authority to build the railway, but there was nothing in the acts giving the defendants any authority to take the plaintiff's property without compensation. Judgment was rendered for the plaintiff, and it was provided that *the injunction should not issue in case the defendants paid the amount of the damage to the fee upon the execution by the plaintiff of a deed conveying to them the plaintiff's interest in the easement taken by the defendants.*

The following is a summary of what was held by the Court of Appeals, so far as the same may be applicable to the present case:

It was held that the elevated railroad structure was as to the plaintiff an illegal structure and inconsistent with the use of the avenue as a public street. That at the time of building the railroad the defendants committed a trespass upon the property, which trespass had been continued from the time when the road was built up to the time of the judgment; that by continuing the trespass the defendants laid themselves open to continuous actions, in which the recovery would be for the damage sustained up to the time of the commencement of each action.

Mr. JUSTICE PECKHAM, speaking for that Court, said:

"In an action at law the owner of the property interfered with or trespassed upon cannot recover damages to his premises based upon the assumption that such trespass is to be permanent. He can recover only the damages which he has sustained up to the commencement of the action. The judgment entered for the damages sustained does not operate as a purchase of the right to continue the trespass. But the owner may resort to equity for the purpose of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the Court may determine the amount of damage which the owner would sustain if the trespass were permanently continued, and it may provide that, upon payment of that sum, the plaintiff shall give a deed or convey the right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon the receipt of a conveyance. The Court does not adjudge that the defendant shall pay such sum and that the plaintiff shall so convey. It provides

that, if the conveyance is made and the money paid, no injunction shall issue. If defendant refuses to pay the injunction issues. It may be that, in the case of a railroad actually running its cars upon or through property of another, it would not be justified in refusing to pay upon the delivery of the conveyance, and, instead thereof, submitting to an injunction. Public interests might have a right to be heard in that respect. But it is enough to say that, in the case where permanent damage is to be paid, there is a condition that a conveyance shall be made, and the defendant thus secures title to the property used. In cases where the owner wishes to actually stop the further trespass, and where the defendant has no legal right to acquire the property, such condition would not be inserted, and an injunction would issue upon the right of the owner being determined (Henderson *vs.* Central Railroad Co., 78 N. Y., 423).

"The plaintiff, if he receive the amount of the permanent damage, is by the Court compelled to convey the interest to the defendant, which the defendant pays for in that way. Condemnation proceedings are thus avoided. It is conclusively determined that the trespass is to be continuous, and defendant concedes it when it avails itself of the condition and pays the permanent damage in order to receive the conveyance. It is only in this way that the owner recovers as for a permanent damage to his property.

Other elevated railroad cases that may be cited are:

Hughes vs. *Metropolitan Elevated R. R. Co.*, 130 N. Y., 15.

Thompson vs. *Metropolitan Elevated R. R. Co.*, 130 N. Y., 360.

Mitchel vs. *Metropolitan Elevated R. R. Co.*, 134 N. Y., 11.

Amerman vs. *Dean*, 132 N. Y., 355, related to certain covenants in conveyances which ran with the land, restricting its use in certain respects. This action was for a permanent injunction and for damages. It was held that while a court of equity has power to enforce the performance of these covenants, the exercise of this authority is within its discretion, and where there has been such a change in the character of the neighborhood as to defeat the objects and purposes of the covenants and to render it inequitable to deprive a grantee of the privileges of conforming his property to that character, such relief will not be granted, and in lieu thereof damages may be allowed.

The trial Court refused a permanent injunction, but awarded damages and an injunction until the damages should be paid, and this judgment was affirmed by the Court of Appeals.

> "This action is in equity, and one of the objects sought is to avoid a multiplicity of actions which might be brought in case only past damages could be recovered.
>
> "*We see no reason why permanent damages may not be awarded. This right is recognized by the recent cases.*"

It is contended by Counsel for the Appellees that "our Courts of Equity have no power to withhold an injunction and to decree in lieu thereof the payment of a sum of money in the way of damages or compensation."

This assertion is made without citation of authority in its support. Certainly, as we have seen, the Courts of New York have frequently exercised the power. It is not there derived from statute, but from the inherent power of Courts of Chancery to so mould their decrees as most effectually to secure justice. They may always

adjust their decrees so as to suit the exigencies of different cases; and may vary, qualify, restrain and model the remedy so as to suit it to the controlling equities and the real and substantial rights of all the parties.

"One of the most striking and distinctive features of Courts of Equity is that they can adapt their decrees to all the varieties of circumstances which may arise, and adjust them to all the peculiar rights of all the parties in interest."

1 Story Eq., Jurisp, 21.

The New York practice has been followed in New Jersey and Massachusetts, and probably in other States.

Attorney General vs. *Paterson*, 60 N. J. Eq., 385.
Jackson vs. *Stevenson*, 156 Mass., 496.

TENTH POINT.

It follows from these considerations that the decree of the Court below allowing a perpetual injunction was erroneous and should be reversed upon such terms and conditions and with such instructions as to this Court may seem proper.

Dated New York, February 15, 1902.

GEORGE L. RIVES,
Corporation Counsel.

GEORGE L. STERLING,
Of Counsel.

APPENDIX.

Laws of 1877, Chapter 445.

An Act to provide for perfecting and perpetuating the right and title of the city of New York to property, water, water rights and privileges heretofore taken or used, or which may be hereafter taken or used, by said city, to increase the supply of pure and wholesome water for the use of said city, and to provide for the payment and extinguishment of all claims or damages growing out of such taking or using.

Passed June 15, 1877, three-fifths being present.

[The title of this act was amended by chapter 516 of the Laws of 1879 so as to make it read as follows :]

An Act to provide a further supply of pure and wholesome water for the city of New York, and to provide for perfecting and perpetuating the right and title of the city of New York to property, water, water rights and privileges, heretofore taken or used, or which may be hereafter taken or used, by said city, to increase the supply of pure and wholesome water for the use of said city, and to provide for the payment and extinguishment of all claims or damages growing out of such taking or using.

The People of the State of New York, represented in Senate and Assembly do enact as follows:

uisition and for aining er sup- by Com- sioner ublic rks.

Section 1. In all cases where the commissioner of public works of the city of New York shall have heretofore entered upon, taken or used, or shall hereafter enter upon, take or use, or shall deem it necessary to enter upon take or use the waters of any lake, or any

upland, or land under water, or water rights or privileges, or any incorporeal hereditaments, or any other property, for the purpose of maintaining, preserving or increasing the supply of pure and wholesome water for the use of said city, the said commissioner is authorized, for and in behalf, and in the name of the mayor, aldermen and commonalty of the city of New York, in the manner hereinafter prescribed, to acquire all rights, titles and interests in and to such real estate, by whomsoever the same may be held, enjoyed or claimed, and to pay for and extinguish all claims or damages on account of such rights, titles or interests, or growing out of such taking or using.

Commissioner, etc., authorized to enter upon lands, etc.

Sec. 2. The said commissioner, his engineers, surveyors and such other persons as may be necessary to enable him to perform his duties under this act are hereby authorized to enter upon any land or water for the purpose of making surveys or examinations, and to agree with the owners, occupants or claimants of any real estate which may have been required or damaged, or which hereafter may be required or damaged, in carrying into effect the provisions of this act, as to the amount of compensation to be paid to such owners, occupants or claimants, and the time and manner of such payment. And in any case such real estate shall be owned, occupied or enjoyed by the people of this state, or by any county, town or school district within this state; such rights, titles, interests or properties may be paid for upon agreement respectively with the commissioners of the land office, who shall act for the people of this state, with a chairman and a majority in numbers of the board of supervisors of any county who shall act for such county and with the supervisor and commissioners of highways in any town who shall act for such town, and with the trustees of any school district that shall act for such district.

Damages, settlement of.

Proceedings in case parties cannot agree.

Sec. 3. In case the said commissioner of public works is unable to agree with the said owner or owners, occupant or occupants, claimant or claimants, of any such real estate, or with any or either of such officers as to the sum or sums to be paid for the acquisition or extinguishment of any such real estate, or of any right, title or interest thereto or therein, for carrying into effect the purposes of this act, the said commissioner of public works shall have the right to acquire such real estate, or to extinguish any such right, title or interest thereto or therein, for the mayor aldermen and commonalty of the city of New York in the manner and by the special proceedings hereinafter provided.

Petition for appointment of Commissioners.

Sec. 4. For the purpose of acquiring such real estate or of extinguishing any right, title, interest thereto or therein, and the said commissioner of public works, for and in behalf of the said mayor, aldermen and commonalty of the city of New York may present a petition praying for the appointment of commissioners of appraisal to the supreme court, at any general or special term thereof, held in the district in which the real estate described in the petition may be situated, such petition shall be signed and verified according to the practice of such court. It must contain a general description of the real estate which the said commissioner seeks to acquire, and of the rights, titles and interests therein which he seeks to extinguish, and also a general statement of the names and places of residence of the parties, as far as the same can by reasonable diligence be ascertained, who own, occupy or enjoy, or who claim to own, occupy and enjoy, any such real estate, or any right, title or interest therein, and if any of such persons are infants, their ages, as near as may be, must be stated; and if any such persons are idiots, or persons of unsound mind, or are unknown, that fact must be stated, together with such other allegations

and statements of liens or incumbrances upon such rights, titles and interests as the said commissioner may see fit to make. A copy of such petition, with a notice of the time and place the same will be presented to the Supreme Court, must be served on all persons whose interests are to be affected by the proceedings at least ten days prior to the presentation of the same to the said Court.

Notice. Service of

1. If the person on whom such service is to be made resides in this State and is not an infant, idiot, or person of unsound mind, service of a copy of such petition and notice must be made on him, or his agent or attorney, authorized to contract for the sale or surrender of the real estate described in the petition, personally, or by leaving the same at the usual place of residence of the person on whom such service must be made as aforesaid with some person of suitable age.

Non-residents.

2. If the person on whom such service is to be made resides out of the State, and has an agent residing in this State, authorized to contract for the sale or surrender of the property described in the petition, such service may be made on such agent, or on such person, personally, out of the State, or it may be made by publishing the notice, stating briefly the object of the application and giving a description of the property to be taken or effected, in the state paper, and in a paper printed in the county in which the real estate taken or effected is situated, once in each week for one month next previous to the presentation of the petition; and if the residence of such persons residing out of this State, but in any of the United States, or any of the British colonies in North America, is known, or can by reasonable diligence be ascertained, the said commissioner must, in addition to such publication as aforesaid, deposit a copy of the petition and notice in the post-office, properly folded and directed to such person at the post-office nearest the place of res-

idence at least two weeks before presenting such petition to the court, and pay the postage chargeable thereon in the United States.

nors. 3. If any person on whom such service is to be made is under the age of twenty-one years, and resides in this state, such service shall be made as aforesaid on his general guardian, or if he has no such guardian, then on such infant, personally, if he is over the age of fourteen years, and if under that age, then on the person who has the care of such infant, or with whom such infant resides.

iots, etc. 4. If the person on whom such service is to be made is an idiot, or of unsound mind, and resides in this State, such service may be made on the committee of his person or estate, or if he has no such committee, then on the person who has the care or charge of such idiot or person of unsound mind.

nknown wners. 5. If the person on whom such service is to be made is unknown, or his residence is unknown and cannot by reasonable diligence be ascertained, then such service may be made under the direction of the court by publishing a notice, stating the time and place the petition will be presented, the object thereof, with a general description of the property to be affected by the proceedings, in the state paper, and in a paper printed in the county where the property is situated, once in each week for two weeks previous to the presentation of such petition.

fant, etc., ithout uardian. 6. In case any party to be affected by the proceedings is an infant, idiot or person of unsound mind, and has no general guardian or committee, the court shall appoint a special guardian or committee to attend to the interests of such person in the proceedings; but if a general guardian or committee has been appointed for such person in this state, it shall be the duty of such general guardian or committee to attend to the interests of such infant, idiot or per-

son of unsound mind, and all notices required to be served in the progress of the proceedings, may be served on such general or special guardian or committee.

Corporations. Municipalities, etc.

7. In case the people of this state, or any county of this state, or any town in this state, or any common school district within this state, or any corporation organized under the laws of this state, shall own, occupy or enjoy any real estate which is to be acquired or affected in carrying into effect the purposes of this act such notice and petition may be served in the manner hereinbefore prescribed, upon the following officers respectively: upon the clerk to the commissioners of the land office, in behalf of the people of the state; upon the clerk of the board of supervisors of any county, in behalf of such county; and upon the supervisor of any town, and the commissioners of highways in any town, in behalf of such town; upon the trustees of any school district, in behalf of such district; and upon the acting chief executive officer of any corporation, in behalf of such corporation.

8. In all cases not herein otherwise provided for, service of orders, notices and other papers in the special proceedings authorized by this act, may be made as the supreme court shall direct.

Real estate may be acquired.

9. Whenever there shall be one or more of the estates enumerated in article one of title two of chapter one of the second part of the Revised Statutes, entitled "Of the creation and division of estates," in any real estate, as the term real estate is defined in this act, required by the city of New York for the purpose of this act, such estate and real estate may be acquired by said city by means of the special proceedings authorized by this act.

Proceedings to acquire same.

In every such case the commissioner of public works, in addition to the statements now required by the said act shall set forth and state in his petition the facts, so

far as the same can with reasonable diligence be ascertained, in relation to any such estate, and the person, persons, or class of persons then in being or not in being, who are or may become entitled in any contingency to any estate as aforesaid in such real estate, and may pray that such estate may be acquired and such persons may be bound by the said proceedings; and thereupon the court to whom such petition is presented, if there be no attorney appearing in their behalf, shall appoint some competent and disinterested attorney or officer of the court to appear in such proceedings and represent the rights, interests and estate of the person, persons, or class of persons aforesaid in such real estate, and to protect the same on the appraisal and proceedings aforesaid; and it shall be the duty of the court, on or after the confirmation of the report of appraisal, to ascertain by such report or by a reference for that purpose or otherwise, in its discretion, the rights, interest and estate of such person, persons or class of persons, in the real estate so appraised and in the compensation awarded therefor, and to make an order determining the amount of share of such compensation to which such person, persons or class of persons are or may become entitled on account of such estate, as the same shall arise or become vested in them respectively, and to direct and to provide for the payment, investment or securing thereof, for the benefit of the person, persons or class of persons aforesaid, who are or who may, in the contingency upon which such estate arises, become entitled thereto; upon the payment or deposit by the comptroller of the city of New York of the sums to be paid for the acquisition of such real estate in the manner provided in section eight of this act, and in the manner directed by order of Court the said commissioner of public works, for and in behalf of the said the mayor, aldermen and commonalty of the city of New York, shall be entitled to enter upon, take possession of and use the said real estate for the

purposes indicated in this act, and such person, persons or class of persons as are or may become entitled to such estate shall be barred of and from all right or claim in and to such land adverse to its use and occupation by the said commissioner or by the said the mayor, aldermen and commonalty.

To apply to all proceedings not completed.

Sec. 2. This act shall take effect immediately, and the provisions hereof shall apply to all special proceedings heretofore brought under chapter four hundred and forty-five of the laws of eighteen hundred and seventy-seven, and the various acts amendatory thereof, and which shall not be completed at the date of the passage of this act.]

The part (subd. 9) within brackets added by chapter 582 of the Laws of 1881.

Appointment of commissioners.

Sec. 5. On presenting such petition to the supreme court as aforesaid, with proof of service of a copy thereof and notice as aforesaid, all or any of the parties whose estates or interests are to be affected by the proceedings may show cause against granting the prayer of the petition, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and, if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders who reside in the county (or some adjoining county) where the property to be appraised is situated, commissioners to ascertain and appraise the compensation to be made to the parties interested in the real estate proposed to be taken or affected or theretofore taken or affected in such county for the purposes indicated in this act, and to fix the time and place for the first meeting of the commissioners.

Powers and duties of commissioners.

Sec. 6. The said commissioners shall take and subscribe the oath prescribed by the twelfth article of the constitution. Any one of them may issue subpœnas and administer oaths to witnesses, and any such witness sworn and examined and testifying falsely shall be deemed guilty of perjury, and shall be liable to the pains and penalties imposed by law for that offense. Such subpœnas may be served within this State by any person and must be served by any sheriff or constable when thereunto required; in case of the failure or refusal of any witness so subpœnaed to obey such subpœna, or to answer any question or to produce any books or papers when thereunto required by a majority of the said commissioners, the commissioners, or a majority of them, shall report such failure or refusal to a justice of the supreme court in the said judicial district in which such commissioners were appointed, before whom the same proceeding shall thereupon be had, as though such failure or refusal were that of a witness duly subpœnaed to appear and testify upon the trial of an action before such justice, and such justice shall in all respects proceed as though such subpœna had issued out of the court in which he presides; a majority of such commissioners may adjourn the proceedings before them, from time to time, in their discretion. Whenever they meet, except by appointment of the court, or pursuant to adjournment, they shall cause reasonable notice to be given to the parties interested, or their agent or attorney. They shall view the property described in the petition, and hear the proofs and allegations of the parties, and reduce the testimony taken by them, if any, to writing, and after the testimony in each case is closed, they, or a majority of them, all having an opportunity to be present, shall, without any unnecessary delay, and before proceeding to the examination of any other claim, ascertain and determine the compensation which ought justly to be

made by the said mayor, aldermen and commonalty of the city of New York to the owners or the persons interested in the rights, titles and privileges to be acquired or affected by the said proceeding. They, or a majority of them, shall also determine what sum ought to be paid to the general or special guardian or committee of an infant, idiot, or person of unsound mind, or to an attorney appointed by the court to attend to the interests of any unknown owner or party in interest, not personally served with notice of the proceedings and who has not appeared, for costs, expenses and counsel fees. They, or a majority of them, shall also (but not in excess of any request therefor made in behalf of the city) determine the height to which the waters of any lake or natural stream, concerning which such proceedings are instituted, may be raised, and the point to which such waters may be drawn down by the said, the mayor, aldermen and commonalty of the city of New York, such determination to be made before any award of damage shall be made on account of such proposed raising or depressing of such waters. The said commissioners shall make a report of their proceedings to the supreme court, with the minutes of the testimony taken by them, if any; and they shall be entitled to the payments hereinafter provided for their services and expenses, to be paid from the fund hereinafter provided.

Report.

Confirmation of.

Sec. 7. On such report being made by said commissioners, the counsel to the corporation of the city of New York shall give notice to the parties, or their attorneys, to be effected * by the proceedings, according to the rules and practice of said court at a general or special term thereof for the confirmation of such report, and the court shall thereupon confirm such report, and shall make an order containing a recital of the substance of the pro-

* So in the original.

ceedings in the matter of the appraisal and a general description of the real estate appraised, for which compensation is to be made; and shall also direct to whom the money is to be paid, or in what bank and in what manner it shall be deposited by the comptroller of the city of New York.

To be recorded.

Sec. 8. A certified copy of the order so to be made as aforesaid shall be recorded, at full length, in the office of the clerk of the county in which the real estate described in it is situated, and thereupon, and on the payment or deposit by the comptroller of the city of New York of the sums to be paid as compensation for the acquisition of such real estate, or for the extinguishment of any right, title or interest therein, and for the costs, expenses and counsel fees as directed by said order, the said commissioner of public works, for and in behalf of the said mayor, aldermen and commonalty, shall be entitled to enter upon, take possession and use the said real estate for the purposes indicated in this act and all parties mentioned in this act who shall have been made parties to the proceedings, together with all parties claiming or to claim, by, through or under them, shall be forever divested and barred of all right, estate and interest in such real estate, and of all claim for any damage on account of the taking, using or affecting of such real estate, or of any right, title, interest therein. All real estate acquired by the said mayor, aldermen or commonalty of the city of New York, under and pursuant to the provisions of this act, shall be deemed to be acquired for public use. Within twenty days after the confirmation of the report of the commissioners, as provided for in the seventh section of this act, either party may appeal, by notice, in writing, to the other, to the supreme court from the appraisal and report of the commissioners. Such appeal shall be heard by the supreme court at any general or special term thereof on due notice thereof being given according to the rules and prac-

Appeal.

tice of said court. On the hearing of such appeal, the court may direct a new appraisal and determination of any question passed upon before the same or new commissioners in its discretion, but from any determination of the general term, either party, if aggrieved, may take an appeal, which shall be heard and determined by the court of appeals. In case of a new appraisal, the second report shall be final and conclusive on all the parties interested. If the amount of compensation to be made by the said city is increased by the second report, the difference shall be a lien on the real estate appraised and shall be paid by the comptroller of the city of New York to the parties entitled to the same, or shall be deposited in bank as the court may direct, and if the amount is diminished, the difference shall be refunded to the said the mayor, aldermen and commonalty of the city of New York by the party to whom the same may have been paid, and judgment therefor may be rendered by the court, on the filing of the second report, against the party liable to pay the same. Such appeal shall not affect the possession by the city of New York of the real estate appraised; and when the same is made by others than the said city it shall not be heard except on the stipulation of the party appealing not to disturb such possession.

Adverse and conflicting claims to money, determination of.

Sec. 9. If there are adverse and conflicting claimants to the money, or any part of it to be paid as compensation for the real estate taken or affected, the court may direct the money to be paid into the said court by the said comptroller, and may determine who is entitled to the same and direct to whom the same shall be paid, and may, in its discretion, order a reference to ascertain the facts on which such determination and order are to be made.

Interest of unknown parties, how protected.

Defects or informalities may be corrected.

Sec. 10. The court shall appoint some competent person to appear for and protect the rights of any party in interest who is unknown, or whose residence is unknown, and who has not appeared in the proceeding by an attorney

or agent. The Court shall also have power, at any time, to amend any defect or informality in any of the special proceedings authorized by this act as may be necessary, or to cause new parties to be added and to direct such further notices to be given to any party in interest as it deems proper, and also to appoint other commissioners in place of any who shall die or refuse or neglect to serve or be incapable of serving.

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Sec. 11. If, at any time, after an attempt to acquire title by appraisal of damages or otherwise, it shall be found that the title thereby attempted to be acquired is defected, the said city may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of such new proceedings the court may authorize the said city, if in possession, to continue in possession, and if not in possession, to take possession and use such real estate during the pendency and until the final conclusion of such new proceedings, and may stay all actions and proceedings against the said city on account thereof on the comptroller of said city paying into court such sum as the court may direct, to pay the compensation therefore when finally ascertained, and in every such case, the party intrusted in such real estate may conduct the proceedings to a conclusion if the said city delays or omits to prosecute the same. And if, at any time, the said city shall require, for the purpose indicated in this act, to acquire any additional real estate, or to extinguish any other or further rights, titles, interested therein in addition to that which it has already acquired or extinguished, such city may acquire such additional real estate or extinguish such additional rights, titles, interests therein, or any such real estate, or any right, title or interest therein, which it now uses or occupies, or which it has heretofore used or occupied, by purchasing the same of the persons or parties owning the same, or interested therein, or

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affected by such proceedings, and by paying to such parties such damage as they may sustain by reason thereof if the amount of such compensation or damages can be agreed upon between such commissioner of public works and such persons or parties; and if such commissioner of public works shall, for any cause, be unable to agree for the purchase of such real estate, or shall be unable to agree upon the sum which shall be paid to such persons or parties in satisfaction of the damages they may sustain, or if the title to any such real estate or rights already acquired or extinguished, or attempted to be acquired or extinguished, shall, for any cause, prove defective or imperfect, then and in every such case such commissioner of public works may proceed to acquire and perfect title to such real estate or rights, and to ascertain and appraise such damages in the manner and by the proceedings hereinbefore in this act prescribed.

Commissioners of land office, powers of.

Sec. 12. The commissioners of the land office shall have power to grant to the said city any real estate belonging to the people of this state which may be required for the purposes indicated in this act, on such terms as may be agreed on between them and the said commissioner of public works, always, however, reserving and maintaining the rights of the people and riparian owners to go to the water at any point to which the same may be drawn; and if any real estate of any county, town or school district is required by such city for the purposes of this act, the majority of the board of supervisors acting for such county, or the supervisor of any such town, with the commissioners of highways therein acting for such town, or the trustees of any school district acting for such district, may grant or surrender such real estate for such compensation as may be agreed upon between such officers, respectively, and the said commissioner of public works.

Supervisors, etc.

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Sec. 13. In case any real estate required by said city for the purposes of this act shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, idiot or person of unsound mind, the supreme court shall have power by a summary proceeding, on petition, to authorize and empower such trustee or general guardian or committee of such infant, idiot or person of unsound mind, to sell, convey or surrender the same to the said city on such terms as may be just; and in case any such infant, idiot or person of unsound mind has no general guardian or committee, the court may appoint a special guardian or committee for the purpose of making such sale, surrender or conveyance, and may require such security from such general or special guardian or committee as said court may deem proper. But before any conveyance or release authorized by this section shall be executed, the terms on which the same is to be executed shall be reported to the court on oath, and if the court is satisfied that such terms are just to the party interested in such rights, titles, interests or property, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of such rights, titles, interests or property having legal power to sell, surrender and convey the same.

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Sec. 14. In all cases where the commissioner of public works shall have heretofore entered upon, taken or used, any real estate, either with or without the license of the owner thereof, for the purpose of increasing the supply of water for the city of New York, and the title to such real estate shall not have been acquired by said city either by purchase or by any proceedings under any existing law and the said city, by any of its officers, agents or employees, shall be in

possession thereof at the time this act shall take effect, and such possession shall be continued for the period of sixty days thereafter, such possession shall be deemed an election on the part of said city to take such real estate under and pursuant to the provisions of this act, and in that case it shall be the duty of the corporation counsel, at the expiration of said sixty days, to make the necessary application for the appointment of commissioners pursuant to the provisions of this act to appraise the dameges and compensation to be paid for the taking and using of the same. The performance of such duty may be enforced by the supreme court by mandamus on the application of any owner or claimant of the real estate so taken or used, and upon the hearing before the commissioners appointed upon such application they shall, if requested by said owners or claimants, also appraise and determine the amount of damages sustained by said owners or claimants respectively by reason of any use or occupation of the said real estate by said city, or any of its officers or agents, before the taking of such application. The said commissioners shall in their report state the amount of damages so ascertained and determined by them, and the amount thereof shall form a part of the amount required to be paid by said city before the right and title to the real estate specified in said report shall be vested in said city as hereinbefore provided. Upon such hearing all of the provisions of this act in relation to compelling the attendance of witnesses, and the examination thereof, shall apply to the claim for damages growing out of such use and occupation.

Right of action

SEC. 15. As to any damages which may have accrued to the owner or claimant of any real estate, as to which the proceedings provided by this act may be instituted, before such proceedings shall have been instituted, this act shall not be taken or construed to deprive any party of a right to a trial by jury of the question of such dam-

age, and the said commissioners shall estimate and determine such damages, and the compensation to be made therefor, only upon the consent of all the parties thereto. Such consent, however, shall be conclusively presumed as against any party who shall appear and take part in the proceedings to determine the amount of such damage, without first entering an objection to the determination* thereof by such commissioners. In absence of such objection, but not otherwise, the said commissioners shall proceed to final determination of such question.

Term "real estate" defined.

SEC. 16. The term real estate, as used in this act, shall be construed to signify and embrace all uplands, lands under water, the waters of any lake, pond or stream, all water rights or privileges, and any and all easements and incorporeal hereditaments, and every estate, interest and right, legal and equitable, in lands or water, including terms for years, and liens thereon by way of judgment, mortgage, or otherwise, and also all claims for damage to such real estate.

Compensation of commissioners, clerks, surveyors, etc., employment of. Comptroller to pay.

Waste of water, prevention of.

Proviso.

SEC. 17. The commissioners appointed in pursuance of this act shall receive as compensation the sum of ten dollars per day for each day actually employed. They may employ the necessary clerks and surveyors. The salaries of the commissioners and of their employees, and the necessary traveling expenses and all other expenses incurred in and about such special proceeding shall be paid by the comptroller of the city of New York. Such salaries and expenses shall not be paid, however, until they have been taxed by a justice of the supreme court in the second judicial district, upon five days' notice to the counsel to the corporation. The said commissioners of appraisal shall recommend to the court such sums as in their judgment are proper costs and disbursements, in-

* So in the original.

cluding fees paid expert witnesses and allowances for counsel, such allowances for counsel not to exceed five per centum of the amount allowed for the acquisition of the real estate (*as amended by Laws of* 1897, *chapter* 713).

Sec. 18. For the purpose of preventing any waste of water, the commissioner of public works of the city of New York is hereby authorized to construct such aqueducts, reservoirs, dams, sluices, canals and appurtenances as may be necessary to collect or retain the water in or from any lakes or streams which may be taken under the operation of this act, and use such waters as the wants and necessities of said city may require. Provided that nothing contained in this or in any existing act shall authorize or permit any water in excess of the ordinary flow thereof to be drawn from Lake Mahopac and Lake Gleneida, in the town of Carmel, and county of Putnam, between the first day of March and the first day of September in any year. And provided also that nothing in this or in any existing act contained shall be so construed as to interfere with any existing right to catch fish, obtain ice, or keep, use and maintain boats in or upon any natural lake or pond which may be acquired under this act; nor shall it be so construed as to destroy any existing right of riparian owners upon such lakes and ponds to use the waters thereof, or to build upon the shores thereof, except as such rights may be affected by the raising or lowering of the waters of such lake or ponds, as hereinbefore prescribed. Proviso.

Sec. 19. It shall be the duty of the comptroller of the city of New York, and he is hereby authorized and directed, on requisition of the commissioner of public works of the city of New York, to raise, from time to time, on bonds of said city, amounts of money sufficient to pay the sums which may be necessary, from time to time, to be Expenditures, etc., payment of.

paid for the acquisition of any real estate, or for the extinguishment of any right, title, interest therein, to be acquired or extinguished under this act, together with all expenses necessarily incurred in surveying, locating and acquiring title to real estate, or extinguishing claims for damages thereto; and also such sums as, from time to time, may be found necessary for the construction of aqueducts,* reservoirs, dams, sluices, canals and appurtenances as are now in process of construction; and all such payments shall be made by the comptroller on the certificate of the commissioner of public works of the city of New York; provided, however, the amount so raised shall not, in any one year, exceed the limitations which, by law, may be or may have been imposed as to the amount of expenditure to be made by the commissioner of public works.

Proviso.

Title of bonds.

Interest.

When redeemable

Payment provided for.

Execution of bonds.

Disposition

Sec. 20. The bonds so to be issued by the comptroller of the city of New York, in pursuance of this act, shall be entitled "additional Croton water stock of the city of New York," shall bear interest at the rate of not exceeding seven per cent. per annum, and shall be redeemable in not less than ten nor more than fifty years, as the said comptroller shall determine to be for the best interest of the said city; and the board of aldermen of the city of New York is hereby authorized and directed to raise, from time to time, by tax upon the estates, real and personal, subject to taxation in the city and county of New York, the sum or sums of moneys which may be required to pay the interest on said bonds and to redeem them at maturity. The mayor and comptroller of said city are hereby authorized and directed to sign said bonds, and it shall be the duty of the clerk of the board of aldermen to countersign the same and to affix thereto the seal of the city. Such bonds shall not be disposed of at less than the par value thereof.

* So in the original.

Amendment of pleadings, etc.

Sec. 21. The said city of New York is hereby required to repair and forever maintain the highways built or in process of construction by the said city around the new reservoir, on the middle branch of the Croton river, in the town of South East.

Acts inconsistent repealed.

Sec. 22. All actions for the recovery of real property, or of any real estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real estate, brought under the provisions of this act, shall be brought and tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in cases provided by statute.

Highways, repair of.

Sec. 23. If in any particular it shall at any time be found necessary to amend any pleading, proceeding, process or action, or to supply any defect therein, arising in the course of any special proceeding authorized by this act, the same may be amended or supplied in such manner as shall be directed by the supreme court, which is hereby authorized to make such amendment or correction.

Actions, places of trial of.

Sec. 24. All acts and parts of acts inconsistent with this act are hereby repealed, provided that nothing herein contained shall at any time be understood, held or construed to repeal any part of chapter fifty-six of the laws of eighteen hundred and seventy-one, entitled "An act to provide a further supply of pure and wholesome water for the city of New York," passed February twenty-seventh, eighteen hundred and seventy-one, excepting the fourth section thereof, which is hereby repealed, nor to repeal the act amendatory of said act, passed April sixth, eighteen hundred and seventy-one, being chapter three hundred and twenty-eight of the laws of eighteen hundred and seventy-one (*as amended by laws of* 1879, *chapter* 516).

Sec. 25. This act shall take effect immediately.